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Relevant Docket Entries

January 19, 1968	Complaint and Affidavit [Filed]
January 22, 1968	Motion to Dismiss Complaint [Filed]
February 6, 1968	Final Order of Dismissal [Filed]
February 21, 1968	Opinion and Judgment of the United States Court of Appeals, 10th Circuit [Filed]

Amended Complaint

(Filed January 19, 1968)

UNITED STATES DISTRICT COURT

DISTRICT OF WYOMING

Civil Action No. 5194

JAMES J. OESTERREICH,

Plaintiff,

—v.—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 11, Cheyenne, Wyoming, SELECTIVE SERVICE APPEAL BOARD FOR THE STATE OF WYOMING; COL. JACK P. BRUBAKER, Wyoming Selective Service Director,

Defendants.

Plaintiff, by his attorneys, complaining of defendants, alleges as follows:

1. Plaintiff is a citizen of the United States and of the State of Wyoming.

2. Defendant Local Board No. 1P is a duly constituted local board of the United States Selective Service System, created by Act of Congress, 62 Stat. 618, as amended, 50 App. U.S.C. 460. Defendant Selective Service Appeal Board for the State of Wyoming is a duly constituted Appeal Board of the United States Selective Service System, created by Act of Congress, 62 Stat. 618, as amended, 50 App. U.S.C. 460. Defendant Col. Jack P. Brubaker is and has been the State Director of the Wyoming State Selective Service System.

3. The jurisdiction of this court is predicated upon 28 U.S.C. 1331, 1343 and 2201, the matter in controversy exceeding the value of $10,000 exclusive of interest and costs, and arises under the Constitution and laws of the United States including 62 Stat. 618, 50 App. U.S.C. 460, and the First, Fifth and Sixth Amendments of the Constitution of the United States.

4. Plaintiff is a male adult citizen. He is and has been, at all times hereinafter referred to, a registrant under the Selective Service System of the United States.

5. Plaintiff Oestereich, a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full time course of instruction in a recognized theological or divinity school, namely, Andover Newton Theological School, Newton Centre, Massachusetts, was, on June 20, 1966, by defendant Local Board No. 11, properly placed in Classification 4-D, which classification is regularly provided for in the Military Selective Service Act of 1967 and the regulations promulgated thereunder, namely, Section 1622.43 of Title 32, Code of Federal Regulations. Plaintiff has at all times herein referred to maintained the status necessary for his 4-D classification.

6. On October 16, 1967, plaintiff, together with numerous other persons duly registered under the Universal Military Training and Service Act, for the sole purpose of expressing dissent from the participation by the United States in the war in Vietnam, returned to the Government of the United States the registration certificate (SSS Form 2) issued him by defendant Local Board.

7. On November 7, 1967 a Delinquency Notice (SSS Form 304) was mailed to plaintiff informing him that he had been declared "A Delinquent" because of "failure to have in his possession a duly authorized registration certificate (SSS Form 2)" and "failure to provide the local board of his current status".

8. By notice mailed November 7, 1967, plaintiff was notified by defendant Local Board No. 11 that he had been reclassified in 1-A. After duly notifying defendant Local Board No. 11 that he appealed his 1-A classification, plaintiff was advised by notice dated December 27, 1967, that defendant Appeal Board had affirmed the 1-A classification issued by defendant Local Board No. 11.

9. On December 27, 1967, defendant Local Board No. 11 mailed to the plaintiff an order to report for induction (SS Form 252) notifying plaintiff to report for induction into the armed forces of the United States on January 24, 1968.

10. Plaintiff has never failed, neglected or refused to perform any lawful duty required of him under said Act or the rules, regulations or directions issued thereunder.

11. Plaintiff has exhausted all the administrative remedies available to him.

12. The declaration that plaintiff is a delinquent, his reclassification to 1-A, and the order issued to him to report for induction, exceeded the statutory and constitutional jurisdiction of the defendants and are wholly without foundation either under said Act or any other statute, regulation or authority.

13. The declaration of plaintiff as a delinquent, his reclassification, and the order issued to him to report for induction, are all punitive in nature, depriving him of a exempt status to which he is properly entitled, were imposed as a penalty by unauthorized and unconstitutional administrative process, and are entirely unrelated to the statutory mandate imposed upon defendants to hear and determine claims with respect to inclusion for, or deferment from, the obligations of serving in the armed forces of the United States.

14. The declaration of plaintiff as a delinquent, his reclassification, and the order issued to him to report for induction, are designed to, and will inevitably have the effect of penalizing the assertion of rights under the First Amendment to the Constitution of the United States.

15. The induction of plaintiff into the Armed Forces of the United States, unless restrained by this court, will cause the plaintiff irreparable injury and damage, in violation of his rights, for which plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays:

(a) That defendants, their agents, servants and employees, be temporarily restrained, and upon full hearing of this matter be permanently restrained and enjoined from undertaking the induction or directing the induction of plaintiff into the Armed Forces of the United States and from interfering with the exercise of First Amendment rights in the manner alleged and set out in the complaint;

(b) That the court adjudge the declaration of plaintiff as a delinquent as null and void and of no legal effect to

alter plaintiff's prior 4-D status under the Military Selective Service Act of 1967;

(c) That the court adjudge that the reclassification of plaintiff is null and void and of no legal effect to alter plaintiff's prior 4-D status under the Military Selective Service Act of 1967;

(d) That the court declare that Selective Service regulations 1602.4 and 1642.1-1642-46, on their face or as applied in this case, violate the United States Constitution;

(e) That the court declare that Selective Service regulations 1617.1 and 1623.5, on their face or as applied in this case, violate the United States Constitution; and

(f) That the court order the defendant to restore to plaintiff his prior 4-D classification; and

(g) For such other and further relief as the court deems just.

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New York, N. Y. 10010

Attorneys for Plaintiff

January , 1968

Affidavit of James Oestereich

(January 5, 1968)

Second Year Student in Theology
Studying for the Ministry
Andover-Newton Theological School
215 Herrick Road
Newton Centre, Mass.

Employed as Youth Minister
Since Fall of 1966
United Parish
39 Main
Lunenburg, Mass.

Account of Events with Reference to Draft Status—
Carried Out from Local Board Number 11
Cheyenne, Wyoming 82001
Post Office Box number 26

October 16, 1967

I joined with some one thousand fellow seminarians, students and other young men of draft age, along with myriads of adult supporters, in an act of collective conscience in support of our dying and suffering brothers who are presently fighting on our behalf in Viet Nam. At this time I turned my draft card over to a participating clergyman, who took the cards to the Justice Department in Washington D. C. on October 20, 1967, and turned them in as a symbol of our desire to support our boys by stimulating an end to the war by grass-roots citizen participation.

The purposes for our act were defined by the corporate Resistance as follows

To demonstrate that clergy and laymen will risk the same unjust fate as students and other youths who feel compelled to turn in their draft cards in abhorrence either of the war in Viet Nam, all wars, conscription in general, or discriminatory deferments and exemptions in particular.

To show allegiance to freedom of conscience above and beyond the narrow and sometimes criminal laws of the state.

To affirm the prophetic role of church and synagogue, along the lines of the national Clergy Concerned draft aid project where individual houses of worship would serve as counseling centers.

I would define this act as a responsible expression of concerned citizens, acting in light of the first amendment of the Constitution of the United States, which states:

> Congress shall make no law regarding the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

November 7, 1967

At this time I was declared "delinquent" by my local board, and reclassified 1-A. My previous classification was IV-D.

Following my basic right of appeal, I appealed my classification on December 6, 1967. The 1-A classification states that the holder is "available for military service." Not being in this state as a candidate for the ministry I can find ample reason for such appeal.

December 27, 1967.

On this date I was mailed an induction notice for January 24, 1968, by vote of the appeal board.

Given this sequence of events I submit the following data concerning my position with reference to this case.

In the preceding events I have been acting corporately within a basic structure of responsible protest, and also out of my understanding of the claims which the Christian faith brings to bear on the human situation. Those claims run as follows.

The Christian faith has traditionally been understood as an encounter between God and man where man responds to God's revelation by concrete participation in the structures and decisions of life, with a transcending loyalty to the will of God, the authority of the scriptures, and the community of interpretation which is the church.

Through many centuries of confronting the question of war, the church has forged out a doctrine of the "Just War." This doctrine has been accepted by the major denominations and divisions within the churches in one form or another. Our unity does not come at the point of pacifism, but rather in a more largely agreed sense with the concrete analysis of each situation on the basis of the principles we have learned in our history.

The basic tenets of the just war doctrine are as follows:

1. Is the war fought for purposes which are just?

2. Is there a reasonable prospect of success?

3. Does waging the war cause less evil than would be caused by not waging war?

4. Can the war be fought in a way that discriminates betwen combatants and noncombatants, between the guilty and the innocent?

5. Can the war be fought so as to use only that degree of force and violence which is proportionate to the requirements of success in achieving justice through the war?

Without going into elaborate and lengthy arguments it is a conviction of a large and growing number of churchmen that a thorough and concise analysis of the Viet Nam situation reveals this war to be in violation of most of the criteria of the just war doctrine and is a major threat to the security and peace of the world. Indeed the present conflict also violates the SEATO pact, the U.N. charter, the Constitution of the United States where Congress has the responsibility for declaring war, and the Nuremburg statutes, which are now American law.

Given this series of broken covenants and the unjust nature of the war, I have interpreted my duty as a citizen, a Christian, and a concerned human being to stand against such a conflict openly, in exercising of my rights.

The Draft System—

Let me now briefly single out why I have taken this stance with relation to the selective service system.

First of all, as the Nuremburg principles guide, it is clear that all Americans have a responsibility for what is going on in Viet Nam. The Selective Service system lies at the heart of this responsibility. Those of us youth who are in the shadow of the system are the ones from whom the challenge must come. Thus we have chosen to serve our country by refusing to disgrace it by participating in a struggle which only stands to cost us lives, at the gain of economic, social, and spiritual death.

Secondly, and most important, there is no provision for conscientious objection on the basis of a Christian interpretation of the just war doctrine (which provides the only possible rationale for the state as well), which is the position of the larger bodies of the church. I was left with no alternative than to return the classification I possessed and disassociate myself from this system. All of this was done as an exercise of my deepest religious and moral convictions.

It is in this understanding then that I must protest the Local Board in Cheyenne for giving me a classification which is incommensurate with my faith and beliefs. A 1-A classification, which indicates the holder's readiness for military service is a violation of my rights as a ministerial candidate and a citizen, under the first amendment.

I have refused to hide from the Selective Service System. I take my stand, as a representative of the corporate Christian community which stands both with me and alongside, including my Seminary and my local church. Together we stand in the American tradition of non-violent resistance and redemptive civil disobedience, committed to our country's cloudy destiny and our God ordained rights within her shores.

/s/ JAMES OSTEREICH

Commonwealth of Massachusetts
Middlesex County

Subscribed and sworn to before me this eighth day of January 1968.

/s/ MARGARET E. BURNS, Notary Public

Motion to Dismiss Complaint

(Filed January 22, 1968)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

[CAPTION OMITTED]

Comes now the United States Attorney for the District of Wyoming and respectfully moves the court to dismiss the plaintiff's complaint heretofore filed in this case for the reason that the court does not have jurisdiction to determine the issues asserted by the plaintiff by reason of the provisions of Public Law 90-40, 81 Stat. 100, Section 8 (c), approved June 30, 1967.

The government further asserts as a ground for dismissal that the constitutional issues asserted by the plaintiff for determination should properly be considered by a three-judge district court as provided by Title 28 USC 2282, rather than by a single district judge.

The foregoing statutory provisions provide an exclusive method of judicial review for the issues involved in this case and have not been followed by the plaintiff.

ROBERT N. CHAFFIN
United States Attorney

Final Order of Dismissal

(Filed February 6, 1968)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

[CAPTION OMITTED]

The above-entitled matter having come on regularly for hearing before the Court on January 22, 1968, plaintiff appearing by and through his counsel, John A. King and Melvin L. Wulf, and defendants appearing by and through Robert N. Chaffin, United States Attorney for the District of Wyoming, and LeRoy Amen, Assistant United States Attorney for the District of Wyoming, and the Court having heard the oral arguments of counsel for plaintiff and of counsel for defendants, and having carefully examined the record on file herein, including the pleadings and the affidavits of plaintiff and his counsel, and having examined the brief submitted by plaintiff's counsel and having studied the authorities relied upon by plaintiff's counsel and by counsel for defendants, and being fully advised in the premises, Finds:

1. The prior Orders made and entered herein on January 22 and 23, 1968, are inconclusive and non-determinative of the issues raised by the pleadings and fail properly to adjudicate the rights of the parties herein, and should be set aside.

2. Plaintiff's pleading filed herein on January 19, 1968, contains no caption to identify his action. For the purposes

of the hearing thereon and of this Order, said pleading is treated as a complaint and a motion for a temporary restraining order.

3. Plaintiff's jurisdictional allegations are mere conclusions unsupported by factual allegations in the complaint and his assertions of federal jurisdiction are unsubstantial, frivolous and without merit. His complaint fails to satisfy the jurisdictional requirements of 28 U.S.C. 1331, 1343, and 2201 in the following particulars:

a. Plaintiff's action does not arise under the Constitution, laws or treaties of the United States. His complaint contains no allegations of facts that defendants subjected him to unreasonable, arbitrary or invidious discrimination, or that he was deprived of his constitutional rights under the First, Fifth, and Sixth Amendments of the Constitution of the United States. Federal jurisdiction is not conferred by the mere assertion of constitutional rights unsupported by factual allegations.

b. Plaintiff's allegation that the matter in controversy exceeds the value of $10,000.00 exclusive of interest and costs is made only for the purpose of invoking the jurisdiction of this court. Plaintiff seeks no monetary damages and does not allege facts which are determinative of the value of the rights sought to be gained by his action. His complaint and argument are concerned with intellectual freedom rather than with economic loss. The failure of jurisdiction of this court under 28 U.S.C. 1331 appears on the face of the complaint for its failure to allege facts showing that the matter in controversy exceeds the sum or value of $10,000.00 exclusive of interest and costs, or to show

facts from which such jurisdictional requirement may be inferred.

c. Sub-sections (1) and (2) of 28 U.S.C. 1343 are inapplicable to confer jurisdiction on this court for the reason that plaintiff does not seek to recover damages. Sub-section (3) of 28 U.S.C. 1343 is likewise inapplicable as no state statute, law, ordinance, regulation, custom or usage is involved in this action. Sub-section (4) of 28 U.S.C. 1343 confers jurisdiction only where an Act of Congress providing for the protection of civil rights is involved and no such Act of Congress is relied upon by plaintiff. Hence 28 U.S.C. 1343 does not support the jurisdiction of this court over plaintiff's action.

d. 28 U.S.C. 2201 does not establish a new basis for jurisdiction of federal courts, but provides a new remedy merely. It requires diversity of citizenship and the statutory jurisdictional amount in controversy to confer jurisdiction on this court. Plaintiff and defendant Col. Jack P. Brubaker are citizens of the State of Wyoming. Plaintiff alleges no monetary damages and asserts no value on the rights he seeks to protect by this action. This Court, therefore, lacks jurisdiction under 28 U.S.C. 2201 for plaintiff's failure to satisfy the requirements of diversity of citizenship and jurisdictional sum or value in controversy.

4. This Court has no jurisdiction to grant judicial review of the classification or processing of the plaintiff by the local board, the appeal board, or the President. Plaintiff does not challenge his classification as a defense to a criminal prosecution, and he has not responded either

affirmatively or negatively to the order of December 27, 1967, to report for induction. The statutory conditions of Public Law 90-40 approved June 30, 1967, 81 Stat. 100, Section 8 (c), 50 App. U.S.C. Section 460 as amended, are not satisfied. Congress may grant or withhold judicial review of administrative action except when required by the Constitution. Estep v. United States, 327 U.S. 114 (1946).

5. Plaintiff fails to allege that there is no basis in fact for the 1-A classification assigned to him. Neither does he allege that defendants acted in an arbitrary or capricious manner in re-classifying him, nor that defendants discriminated against him by such re-classification.

6. Defendants are arms of the Executive branch of the United States Government, and their performance of their duties imposed upon them by the Universal Military Training and Selective Service Act is not subject to the supervision of or direction by the Judicial Department. This Court has no jurisdiction to encroach upon the discretion vested in defendants in the performance of their responsibilities under the Act. To assume jurisdiction over plaintiff's action would violate the fundamental constitutional precept of separation of powers of the Executive and Judicial Departments of the United States.

7. Plaintiff knowingly violated the law and the regulation requiring him to have his registration certificate in his possession at all times.

8. The exempt status claimed by plaintiff and the classification assigned to him are matters of legislative and executive grace. Exemptions and classifications are a privilege, not an inalienable right conferred by the constitution

or statute. Absent positive allegations of arbitrary or capricious acts, defendants have the right and duty to exercise their informed discretion and classify plaintiff without interference by the judiciary.

9. Plaintiff's allegations that the declaration of delinquency, the re-classification, and the order of induction are punitive in nature, imposed as a penalty, are unsubstantiated conclusions of fact; they are merely illusory conclusions and opinions based on conjecture. The administrative action taken by defendants does not constitute penal action as it does not subject plaintiff to criminal punishment.

10. Section 2282 of 28 U.S.C. providing for a court of three judges is not applicable unless questions are raised in the complaint as to the constitutional validity of an Act of Congress. It does not apply to administrative orders or action. It confines its requirement for a court of three judges to cases where an Act of Congress is attacked upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States. Plaintiff's action does not attack any act of Congress on constitutional grounds and raises no substantial question of constitutional validity of the Universal Military Training and Selective Service Act. Plaintiff's action challenges the validity of the administrative action with regard to his individual induction status; his prayer only, challenges the validity of the regulations under the Universal Military Training and Selective Service Act. Plaintiff's action raises no substantial question of constitutional validity as to the Act itself. Plaintiff's complaint, therefore, is not within 28 U.S.C. 2282 providing for the convocation of a three-judge District

Court. William Jameson & Co. v. Morgenthau, 307 U.S. 171 (1939); Sardino v. Federal Reserve Bank of New York, et al., 2 Cir., 361 F.2d 106 (1966).

NOW, THEREFORE, IT IS ORDERED that the Order of this Court made and entered herein on January 22, 1968, denying temporary restraining order and dismissing complaint, and the Order Nunc Pro Tunc made and entered herein on January 23, 1968, dismissing the complaint of the plaintiff, be, and the same are hereby, set aside.

IT IS FURTHER ORDERED that plaintiff's motion for temporary restraining order and plaintiff's complaint, together with the cause, be, and the same are hereby, dismissed for the reasons stated herein, the parties to pay their own costs.

Dated this 6th day of February, 1968.

EWING T. KERR
Judge

Judgment of the United States Court of Appeals for the Tenth Circuit

January Term, Wednesday, February 21st, 1968.

[CAPTION OMITTED]

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein and Honorable John J. Hickey, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Wyoming and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

Opinion of the United States Court of Appeals for the Tenth Circuit

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

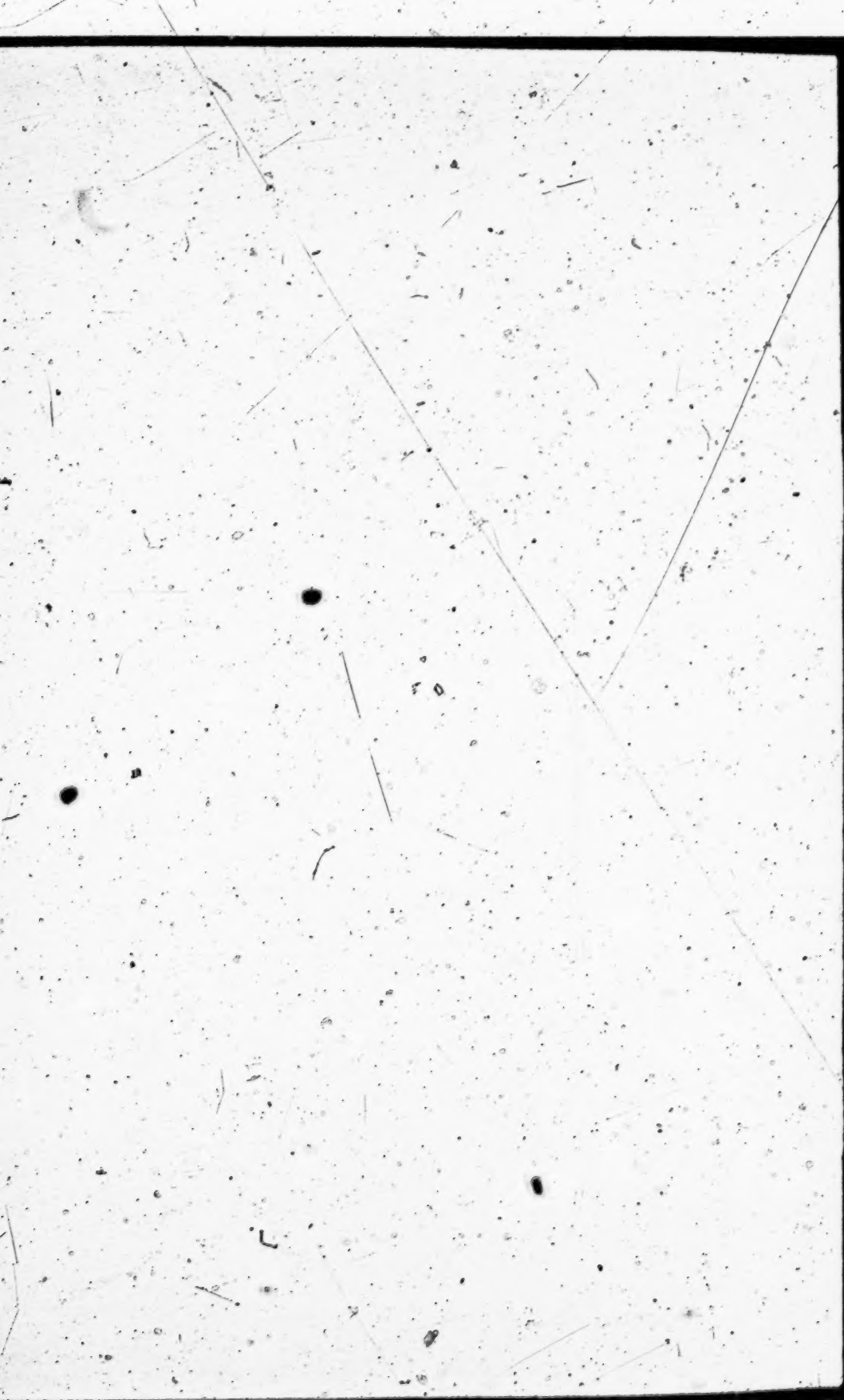
No. 9902—January Term, 1968

[CAPTION OMITTED]

Before Lewis, Breitenstein and Hickey, Circuit Judges.

PER CURIAM.

The judgment is affirmed for the reasons set forth in the memorandum decision of the trial court and particularly in view of the jurisdictional restrictions contained in 50 App. U.S.C. §460(b)3. Orderly classification of a registrant for military service is not punitive in nature. Compare United States v. Capson, 10 Cir., 347 F.2d 958. Appellant is not denied his right to ultimate judicial review of his claimed rights. Witmer v. United States, 348 U.S. 375, 377.



MAR 19 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1246 46

JAMES J. OESTEREICH,

Petitioner,

—v.—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 11, Cheyenne, Wyoming, SELECTIVE SERVICE APPEAL BOARD FOR THE STATE OF WYOMING, COLONEL JACK P. BRUBAKER, Wyoming Selective Service Director,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Ex Parte Young, 209 U. S. 123 (1908) 16, 17

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* Denotes case is currently pending.

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Leedon v. *Kyne*, 358 U. S. 184 (1958) 20n

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Other Citations:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

JAMES J. OESTEREICH,

Petitioner,

—v.—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 11, Cheyenne, Wyoming, SELECTIVE SERVICE APPEAL BOARD FOR THE STATE OF WYOMING, COLONEL JACK P. BRUBAKER, Wyoming Selective Service Director,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on February 21, 1968.

Citations to Opinions Below

The *per curiam* opinion of the Court of Appeals for the Tenth Circuit is unreported. It is contained in the Court of Appeals record[1] at p. 4 and is printed in the Appendix,

[1] The original records of the District Court and the Court of Appeals, which have both been filed with the Clerk, are separately paginated. References to the District Court record are noted by the symbol "R"; references to the Court of Appeals record are noted by the symbol "RA".

infra, pp. 1a-2a. The order of the District Court for the District of Wyoming, dismissing the complaint, is unreported. It is set forth at pp. 28-33 of the District Court record and is printed in the Appendix, *infra*, pp. 3a-8a.

Jurisdiction

The judgment of the Court of Appeals was entered on February 21, 1968 (RA. 5). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

Questions Presented

Petitioner, a student preparing for the ministry, was exempt from training and service in the Armed Forces under Section 6(g) of the Military Selective Service Act of 1967 [50 App. U. S. C. §456(g)]. Upon returning his Selective Service Registration Certificate to the government as a statement of protest against the war in Vietnam, petitioner was declared delinquent under the Selective Service regulations, stripped of his exemption, reclassified I-A, and ordered to report for induction. Under these circumstances:

1. Does Section 10(b)(3) of the Military Selective Service Act of 1967 [50 App. U. S. C. §460(b)(3)] preclude judicial review of petitioner's punitive reclassification and order to report for induction?

2. Does the declaration of delinquency, punitive reclassification, and induction of petitioner for failure to have his Registration Certificate in his personal possession, violate the First Amendment, the due process clause of the Fifth Amendment, the Military Selective Service Act of 1967, and the Selective Service regulations?

3. Does Selective Service regulation 1617.1 [32 C. F. R. §1617.1], which requires each Selective Service registrant to "have in his personal possession at all times his Registration Certificate," as construed and applied in this case, violate the First Amendment?

Statutes and Regulations Involved

Section 10(b)(3), Military Selective Service Act of 1967; 50 App. U. S. C. §460(b)(3):

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has respondent either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

Section 6(g), Military Selective Service Act of 1967; 50 App. U. S. C. §456(g):

> "Ministers of religion.—Regular or duly ordained ministers of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are

satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been preenrolled shall be exempt from training and service (but not from registration) under this title."

Selective Service Regulation 1617.1; 32 C. F. R. §1617.1:

"Effect of failure to have unaltered registration certificate in personal possession.—Every person required to present himself for and submit to registration must, after he has registered, have in his personal possession at all times his Registration Certificate (SSS Form 2) prepared by his local board which has not been altered and on which no notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. The failure of any person to have his Registration Certificate (SSS Form 2) in his personal possession shall be prima facie evidence of his failure to register. When a registrant is inducted into the armed forces or enters upon active duty in the armed forces, other than active duty for training only or active duty for the sole purpose of undergoing a physical examination, he shall surrender his Registration Certificate (SSS Form 2) to the commanding officer of the joint examining and induction station or to the responsible officer at the place to which he reports for active duty, and such certificate shall be destroyed by the officer to whom it is surrendered."

Selective Service Regulation 1642.4(a); 32 C. F. R. §1642.4(a):

"Declaration of Delinquency Status and Removal Therefrom.—(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form 153), the local board may declare him to be a delinquent."

Statement of the Case[2]

Petitioner is a duly enrolled student of Andover Newton Theological School, Newton Centre, Massachusetts, a "recognized theological or divinity school" [50 U. S. C. §456(g); 32 C. F. R. 1622.43(a)(4)]. As such he was classified IV-D by Local Board 11 on June 20, 1966 and thus exempt from military service.

On October 16, 1967, together with numerous other persons, petitioner returned his Registration Certificate (SSS Form 2) to the United States Government solely for the purpose of registering his dissent from participation by the United States in the war in Vietnam (R. 2). Petitioner, by affidavit, explained in detail his reasons for returning his Registration Certificate. He described it as "an act of collective conscience in support of our dying and suffering brothers who are presently fighting on our behalf in Vietnam" (R. 7). His act was based upon his "understanding of the claims which the Christian faith brings to bear on

[2] The Statement of the Case is based upon the allegations in the complaint, taken as admitted upon the government's motion to dismiss. *Clark* v. *Nebersee Finanz Korporation*, 322 U. S. 480 (1947).

the human situation" (R. 9) including the belief that "man responds to God's revelation by concrete participation in the structures and decisions of life, with a transcending loyalty to the will of God, the authority of the scriptures, and the community of interpretation which is the church" (*ibid.*), and in his belief in the doctrine of the "Just War". He stated his belief that "the Viet Nam situation reveals this war to be in violation of most of the criteria of the just war doctrine and is a major threat to the security and peace of the world" (R. 10).

Petitioner "became delinquent" on October 20, 1967, but a Delinquency Notice (SSS Form 304) was not mailed to him until November 7, 1967. On the same day, November 7th, a Notice of Classification (SSS Form 110) was mailed to petitioner notifying him that he was reclassified I-A (R. 3).[3]

The Delinquency Notice advised petitioner that he was delinquent because: (1) "Failure to have in his possession

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[3] Petitioner's declaration of delinquency and reclassification followed the issuance of a letter dated October 26, 1967 and a memorandum dated October 24, 1967 from General Lewis B. Hershey, Director of Selective Service, to all local Selective Service Boards. (The letter and memorandum are reproduced in the Appendix, *infra*, pp. 9a-12a.) The letter invited local boards to deny deferments to any registrant who takes part in "any action that violates the Military Selective Service Act or the Regulations, or the related processes." General Hershey's letter also said that "It is to be hoped that misguided registrants will recognize the long range significance of accepting their obligations now, rather than hereafter regretting their actions performed under unfortunate influences of misdirected emotions, or possibly honest but wholly illegal advice, or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation and the preservation of the liberties of each of our citizens."

The October 26, 1967 memorandum from General Hershey invited local boards to reclassify and induct registrants who abandon their Registration Certificates or current notices of classification.

a duly authorized Registration Certificate (SSS Form 2)" and (2) "Failure to provide the local board of his current status" (R. 3).

Petitioner duly appealed his I-A classification to the Selective Service Appeal Board for the State of Wyoming which affirmed the classification on December 27, 1967 (R. 3). On the same day, an order to report for induction was mailed to petitioner, directing him to report for induction in Cheyenne at 3:00 P.M. on January 24, 1968 (R. 3). (Petitioner's place of induction was subsequently transferred (pursuant to 32 C. F. R. §1632.9) to Dorchester, Massachusetts, and postponed to February 26, 1968.)

On January 19, 1968 suit was filed in the United States District Court for the District of Wyoming. (The complaint is set out at R. 1-6.) A hearing was held on January 22nd on plaintiff's application for a temporary restraining order (R. 14). After oral argument the District Court granted the defendants' Motion to Dismiss from the bench. An order dismissing the action was entered that day (R. 23-24), a subsequent *nunc pro tunc* order was entered on January 23, 1968 (R. 25), and an Order Setting Aside Prior Orders and Dismissing Plaintiff's Action was entered on February 6, 1968 (R. 28-33).[4] Notice of Appeal was filed on February 6, 1968 (R. 34).

Because there was an outstanding order requiring petitioner to report for induction on February 26, 1968, an expedited appeal was heard by the United States Court of Appeals for the Tenth Circuit on February 19, 1968. On

[4] The latter order, which superseded the two prior orders, is set out in the Appendix, *infra*, pp. 3a-8a.

February 21, 1968, the court affirmed the decision below in a *per curiam* decision which reads in its entirety as follows:

> "The judgment is affirmed for the reasons set forth in the memorandum decision of the trial court and particularly in view of the jurisdictional restrictions contained in 50 App. U. S. C. §460(b)3. Orderly classification of a registrant for military service is not punitive in nature. Compare United States v. Capson, 10 Cir., 347 F. 2d 958. Appellant is not denied his right to ultimate judicial review of his claimed rights. Witmer v. United States, 348 U. S. 375, 377."

An application for a stay was denied by the Tenth Circuit on February 23, 1968. On the same day an application to stay petitioner's induction was presented to Mr. Justice White. On March 5, 1968, after the government had agreed to the postponement of petitioner's induction to allow time for consideration of the application, Mr. Justice White issued an order staying "the execution and enforcement of the judgment of the United States District Court for the District of Wyoming, as affirmed by the United States Court of Appeals for the Tenth Circuit . . ." on the condition that this petition for certiorari be filed on or before March 19, 1968.

Reasons for Granting the Writ

Certiorari should be granted in this case because it involves important issues of federal law, both constitutional and statutory, which have not been, but should be, settled by this Court, because it directly and immediately affects a large number of young men subject to Selective Service, because it involves the imposition of penalties and burdens upon petitioner and others solely for their public statement of opposition to government policies in Vietnam, and because it is only one illustration of an extensive government practice whose broad effect is to stifle the exercise of First Amendment rights.

1. Petitioner's registration certificate was one of 357 draft cards which were returned to the government at a demonstration at the Department of Justice on October 20, 1967 (Washington Post, January 25, 1968, p. ——), and an additional 297 draft cards returned the next day during a demonstration at the Pentagon (N. Y. Times, December 30, 1967, p. 2).

On October 24, 1968, the Director of Selective Service, General Lewis B. Hershey, issued a memorandum to all local draft boards recommending the reclassification and induction of registrants who abandon their Selective Service registration certificates or notices of classification. Appendix, *infra*, p. 11a. Two days later, General Hershey, in a letter addressed to all draft boards, invited the reclassification and induction of any registrant who "violates the military Selective Service Act or the Regulations, or ıe related processes . . . " App., *infra*, p. 9a.

The local boards responded promptly and affirmatively. Though counsel cannot say precisely how many registrants have been declared delinquent, stripped of their deferments or exemptions, reclassified I-A, and ordered for priority induction into the armed forces, we have personal knowledge of no less than forty-nine plaintiffs in ten lawsuits who, having either been declared delinquent, or declared delinquent and reclassified I-A, are subject to priority induction.[5] *Linzer, et al.* v. *Selective Service System Local Board No. 64, et al.*, No. 68 C 110 (E. D. N. Y.); *Kimball, et al.* v. *Selective Service Local Board No. 15*, No. 67/4733 (S. D. N. Y.); *Bucher, et al.* v. *Selective Service System, et al.*, No. 12, 26/67 (D. N. J.); *Collis* v. *Selective Service Local Board No. 28*, No. C-67-19-M (N. D. W. Va.); *Anderson, et al.* v. *Hershey, et al.*, No. 30729 (E. D. Mich.); *Steinert, et al.* v. *Clark, et al.*, No. 48654 (N. D. Cal.); *Kolden* v. *Selective Service Local Board No. 4*, No. 6-68-64 Civil (D. Minn.); *Breen* v. *Selective Service Local Board No. 16*, No. 12422 (D. Conn.); *Turley* v. *Selective Service System Local Board No. 134*, No. 68-290-F (C. D. Cal.); *Huey* v. *Selective Service Local Board No. 22, et al.*, No. —— (C. D. Utah);[6] *Connor*

[5] A "delinquent" *may* be classified I-A. Reg. 1642.12. If a delinquent is reclassified I-A, he *shall* be ordered to report for induction. Reg. 1642.13. I-A delinquents stand at the top of the order of call and are to be inducted before all other draftees. Reg. 1631.7.

[6] Huey was reclassified I-A delinquent not for turning in his draft card but for participating "in a peaceful public demonstration near the Armed Forces Entrance and Examination Station at 438 South Main Street, Salt Lake City, Utah, for the sole purpose of expressing publicly his dissent from American involvement in the Vietnam War." *Huey* Complaint, p. 2. *Huey* is an example of the punitive reclassification of a registrant pursuant to the Hershey letter of October 26, 1967. Appendix, *infra*, p. 9a. In *Peffer's and Hess* v. *Selective Service Appeal Board*, No. 7469 (W. D. Wash.), two men were reclassified I-A and ordered for priority

et al. v. *Selective Service Local Board, et al.*, No. Civ.—1968—33 (W. D. N. Y.).

Registrants who have been declared delinquent, declared delinquent and reclassified, or ordered to report for induction, include men in a variety of classifications. Some, like petitioner, had been exempt as ministers or students of the ministry (50 App. U. S. C. §456(g); Reg. 1622.43); others had been deferred as students (50 App. U. S. C. §456(h) and (i); Regs. 1622.25, 1622.26); a 37 year old registrant formerly classified V-A under Reg. 1622.50 because over-age, was reclassified I-A (N. Y. Times, December 20, 1967, p. 15); of the six plaintiffs in *Linzer* v *Selective Service System, supra,* all but one of whom have been reclassified I-A, two had II-S deferments as students, one had been classified I-Y because "under applicable physical, mental, and moral standards [he is] not currently qualified for service" (Reg. 1622.17), one had been deferred in class III-A as a parent (Reg. 1622.30), one had been classified IV-A having completed his military service (Reg. 1622.40),[7] and one had been classified V-A as over the age of liability (Reg. 1622.50).[7a]

Thus, petitioner is not a victim of an aberrant draft board. Though we cannot say with certainty how many men have been declared delinquent, reclassified, or ordered to report for induction, we know that the number is far greater than forty-nine.

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induction for distributing anti-war leaflets during their pre-induction physical examinations. The plaintiffs' deferments were restored by their boards only after suit was filed.

[7] The IV-A plaintiff was not reclassified I-A. Veterans may be reclassified I-A only with the authorization of the Director of Selective Service. Reg. 1642.12.

[7a] As of December 31, 1967, there were 15,593,748 registrants in V-A. Selective Service, February 1968, p. 4.

Whatever the number of registrants who have been directly affected by the policy at issue here, equally significant is the number of registrants who have been silenced out of fear that, should they publicly protest against the war in Vietnam, they too will lose their deferred or exempt status. It was precisely this enforced sacrifice of rights protected by the First Amendment that led to the decision in *Wolff* v. *Selective Service*, 372 F. 2d 817 (2nd Cir. 1967), a case almost identical to the case at bar.

In *Wolff*, two registrants classified II-S as full time university students participated in a demonstration to protest the Vietnam war. The protest took place at the offices of a Selective Service local board in Ann Arbor, Michigan. Both men were reclassified I-A by their local boards "at the request of the New York City Director of Selective Service." The request was based upon the assertion that by participating in the demonstration the students became delinquent by reason of their alleged violation of Section 12(a) of the Universal Military Training and Service Act.[8] 372 F. 2d at 820. Suit was brought by the plaintiffs to recover their II-S deferments. The case was dismissed in the District Court for lack of a "justiciable controversy." The Court of Appeals reversed. It found that "The threat to First Amendment rights is of such immediate and irreparable consequence not simply to these students but to others as to require prompt action by the

[8] The alleged Section 12(a) violation [50 App. U. S. C. §462(a)] was based upon its prohibition against knowingly hindering or interfering "by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto . . ." The equivalency in the case at bar is Section 12(b)(6) [50 App. U. S. C. §462(b)(6)] which makes it a crime to fail to possess one's registration certificate.

courts to avoid an erosion of these precious constitutional rights." 372 F. 2d at 820.

In reply to the government's claim that the policy of non-intervention in the affairs of Selective Service must be paramount, the Court said:

> "Only the most weighty consideration could induce us to depart from this long standing policy. But of all constitutional rights, the freedoms of speech and of assembly are the most perishable, yet the most vital to the preservation of American democracy. Historically, these preferred and paramount rights have continuously come under attack from the best intentioned sources. And once the erosion of these rights is permitted to begin, it is exceedingly difficult to halt and the intervening damage may be irreparable. Here it is the free expression of views on issues of critical current national importance that is jeopardized. On such topics perhaps more than any other, it is imperative that the public debate be full and that each segment of our society be permitted freely to express its views. Thus the allegations of the complaint in this case that the draft boards have unlawfully suppressed criticism must take precedence over the policy of non-intervention in the affairs of the Selective Service:" *Id.* at 822.

In rejecting the government's claim that the suit was not justiciable because the appellants had failed to exhaust their administrative remedies[9] and because they could not demonstrate irreparable injury, the Court said:

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[9] Unlike the petitioner in the case at bar (R. 3).

> "It has been held repeatedly that the mere threat of the imposition of unconstitutional sanctions will cause immediate and irreparable injury to the free exercise of rights as fragile and sensitive to suppression as the freedoms of speech and assembly. . . . Since it is the mere threat of unconstitutional sanctions which precipitates the injury, the courts must intervene at once to vindicate the threatened liberties." *Id.* at 824. (Citations omitted.)

We recite these excerpts from *Wolff* to emphasize that this case involves more than just petitioner's rights. Respondents' acts generally imperil the exercise of First Amendment rights.

Whatever the purpose of the Selective Service policy may be,[10] its inevitable effect is to stifle or at least to deter the exercise of free speech. It would be unrealistic to imagine that there are not those who would rather remain silent

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[10] General Hershey, interpreting his October 26, 1967 letter to draft boards, said, "I actually have a lot of confidence in the kids of this country. All I hope to do is to discourage some of the excesses we have had in the past." N. Y. Times, November 8, 1967, pp. 1, 10.

It was reported that Department of Justice officials believed that were the Selective Service Regulations amended to incorporate General Hershey's policy, "it would be unconstitutional on the ground that it would violate an individual's right to free speech under the First Amendment." N. Y. Times, November 10, 1967, p. 12. Nonetheless, General Hershey responded that "he did not intend to rescind his recommendation, even if the Justice Department did not support him. . . ." N. Y. Times, November 11, 1967, p. 5. Though there subsequently was an apparent rapprochement between General Hershey and the Attorney General, see N. Y. Times, December 10, 1967, p. 1, the agreement seems to have been short-lived. See N. Y. Times, December 11, 1967, p. 13; December 12, 1967, p. 16.

and civilian, than speak out and risk the loss of their deferred or exempt status. It will presumably be said that registrants who express their views without violating the Selective Service Act need not fear any sanctions. But given the broad language of General Hershey's letter and memorandum[11] and the equally broad language of the delinquency regulation (Reg. 1642.4(a)) through which the policy is implemented,[12] it must be acknowledged that "When the statutes also have an overbroad sweep . . . the hazard of loss or substantial impairment of those precious [First Amendment] rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights." *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965).

2. This case presents six questions of federal law which should be settled by this Court. Each of the questions is independently substantial; but given the First Amendment setting out of which they arise, the need for their resolution is compelling.

a. The government has argued, and the courts below have held, that Section 10(b)(3) of the Military Selective Service Act of 1967, *supra*, p. 3, prohibits judicial review of petitioner's reclassification and induction order except in a criminal prosecution should petitioner refuse to submit to induction [see *Estep* v. *United States*, 327 U. S. 114 (1946)], or by habeas corpus should petitioner choose to submit to induction [see *Eagle* v. *United States ex rel. Samuels*, 329 U. S. 304 (1946)].

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[11] His letter, for example, invites local boards to reclassify those who violate not only the "Military Selective Service Act or its regulations" but also "the related processes." App., *infra*, p. 9a.

[12] See pp. 24-26, *infra*.

Petitioner does not generally challenge the proposition that judicial review of Selective Service classification in the ordinary case can properly be confined to criminal prosecution or habeas corpus, for the power of Congress to establish modes of review is broad. U. S. Constitution, Art. III; *Lockerty* v. *Phillips*, 319 U. S. 182 (1943); *Yakus* v. *United States*, 321 U. S. 414 (1944). But see *Townsend* v. *Zimmerman*, 237 F. 2d 376 (6th Cir. 1956).

On the other hand, this Court has recognized that the right to effective judicial review cannot be impaired by placing extreme burdens and penalties on the exercise of that right. *Ex Parte Young*, 209 U. S. 123 (1908); *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (1920).

Young held that the guarantee of due process of law required judicial review where an administrative order could be reviewed only as a defense to contempt proceedings for failure to follow prescribed rates, with penalties up to five years in jail and a $5,000 fine. The Court recoiled at this deterrent to judicial review:

> "A law which indirectly accomplishes a like result [making administrative orders conclusive] by imposing such conditions upon the right to appeal for judicial relief as work an abandonment of the right rather than face the conditions which it is offered or may be obtained is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights." 209 U. S. at 147.

The concern for insuring judicial review has nowhere been more meticulous than when the rights for which the judicial power is invoked are those protected by the First Amendment. Decisions of this Court over the last several years leave little doubt of the primacy of First Amendment rights. The Court has expressed concern not only with direct governmental attempts to infringe those rights, but also with statutes and rules that have an indirect but deadly effect on the exercise of those rights. One of the most effective ways to destroy rights is to inhibit and frustrate the remedies available for their implementation. And it follows that the best way to cripple the remedy is to place burdensome limitations upon those who seek to exercise it. To interpret the statute in question as requiring the registrant who is the victim of punitive classification and induction order to subject himself to indictment and prosecution or induction merely to assert his claim that the board action violates his First Amendment rights, effectively nullifies those rights.

This Court has held that statutory schemes which impose an intolerable restraint and have a "chilling effect" on the exercise of First Amendment rights cannot constitutionally be allowed. *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965). *Ex Parte Young, supra,* and *Oklahoma Operating Co.* v. *Love, supra,* demonstrate that in the protection of rights of property judicial review cannot be forestalled until the point where its utilization becomes fraught with peril and hazard. *Dombrowski,* and the long line of cases it synthesized, show that rights of liberty are surely entitled to at least the same protection. Petitioner cannot be forced to choose between the Scylla of adhering to an order which may ultimately be held void or the Charybdis of disobey-

ing an order which may ultimately be held valid. See, *Yakus* v. *United States, supra* (dissenting opinion).

Dombrowski v. *Pfister, supra,* is central to this case. There various officials of a civil rights organization were being threatened with prosecution under state statutes which appeared to be drawn in violation of the First and Fourteenth Amendments. They brought suit in the federal court seeking declarative and injunctive relief against prosecution or the threat of prosecution. The suit was dismissed by a statutory three-judge court and this Court reversed.

After expressing its concern for considerations of federalism and noting that only "special circumstances" justify "cutting short the normal adjudication of constitutional defenses in the course of a criminal prosecution," 380 U. S. at 485, the Court pointed out that the complaint depicted a situation in which "a substantial loss or impairment of freedom of expression will occur if appellants must await the state court's disposition and ultimate review in this Court . . . " 380 U. S. at 486. Because of the "sensitive nature of constitutionally protected expression" and in light of the fact that free expression is "of transcendent value to all society" the normal rules as to standing have been relaxed in this area.

The Court concluded that the need for "prompt judicial resolution of First Amendment claims" outweighted considerations of federalism and justified the exercise of federal jurisdiction.

The parallels to the instant case are obvious. Here petitioner asserts that the punitive reclassification violates his protected constitutional rights to freedom of expression. As the courts below interpreted Sec. 10(b)(3), in order to

secure judicial review of the invalid induction order, petitioner must violate the law, suffer the ignominy of indictment, and endure the burdens of a criminal trial. The very fact of prosecution, and even its threat, as the Court noted in *Dombrowski,* will have the prohibited "chilling effect" on petitioner's rights and on the rights of others who protest the Vietnam war.

The effect of such towering obstacles to judicial review on other Selective Service registrants is crucial. Few will be willing to pay such a high price for the right to dissent. The result is clear: thousands of registrants will be denied First Amendment rights. They will have to exercise their right to lawful dissent with one eye cast on their local draft board, fearful that their activities will meet with disapproval and result in reclassification. Those with valid deferments will "steer far wider of the unlawful zone," *Speiser* v. *Randall,* 357 U. S. 513, 526 (1958). Draft boards can reclassify them I-A with impunity and dare registrants to run the hazards of criminal prosecution to prove the board wrong. In such an environment, "sensitive" constitutionally protected expression can hardly flourish as our free society demands it must.

In order to avoid constitutional infirmities, we urge that where "special circumstances" exist, that is, where government action has a "chilling effect" on registrants' First Amendment rights, the federal courts have jurisdiction to review. Cf. *Dombrowski* v. *Pfister, supra* at 485: Note, 81 Harv. L. Rev. 685, 690 (1967). Such an approach avoids any implication that the ruling which petitioner urges could be taken advantage of by any registrant aggrieved by an order of his local board. We do not contend that every board order should give rise to pre-induction review.

For the purposes of this case it is only necessary to decide whether in the exceptional case which stems from the violation of protected rights of free expression, the policy of orderly conscription must give way to the compulsion of the Constitution.[13]

b. Certiorari should be granted to decide whether the punitive use of delinquency and reclassification procedures, as in this case, is authorized by statute or regulation.

The Military Selective Service Act of 1967 declares that service in the armed forces is an obligation and privilege. Section 1(c), 50 App. U. S. C. Sec. 451(c). This view of service is also reflected in Section 6(m) of the Act which allows, if it does not encourage, exclusion from service of those convicted of offenses punishable by imprisonment for a term exceeding one year.

Nonetheless, respondents here have presumed to invoke the delinquency and reclassification procedures against petitioner because he violated Reg. 1617.1 which requires regis-

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[13] A similar approach has been taken in the area of labor relations. In *Leedom* v. *Kyne*, 358 U. S. 184 (1958), this Court sustained direct judicial review of an NLRB certification order made in excess of the Board's powers, rejecting the argument that the Act precluded such review:

> "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id.* at 190.

This "exception" for orders in excess of the Board's jurisdiction was extended to include the case of an order which caused international repercussions. *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10 (1963). By 1964 this "extraordinary circumstances" rule, which allowed direct challenge of Board orders in certain instances, was clearly established. See, *Boire* v. *Greyhound Corporation*, 376 U. S. 473, 479 (1964).

trants to have their registration certificates in their personal possession, a requirement enforceable under the Act's penal provision. Section 12(b)(6), 50 App. U. S. C. Sec. 462(b)(6). Thus, the circumstances here are the same as in *Wolff* v. *Selective Service, supra,* where the Second Circuit held that the draft boards "exceeded their jurisdiction" when they undertook to declare registrants delinquent on the ground that they violated the Act's penal provisions. 372 F. 2d at 820. ". . . [N]o regulation authorizes a draft board to declare a registrant a delinquent or to reclassify him for such action." *Id.* at 821.

As *Wolff* points out, however, jurisdiction of some offenses under Section 12 is shared by the District Courts and the local boards. The decision refers explicitly to that portion of Section 12(a) which makes it a crime for any person knowingly to "fail or neglect or refuse to perform any duty required of him under or in execution of this title."[14] Thus, as the Second Circuit said, "a parallel clause of the regulations provides that if a registrant fails to produce certain requested information or to appear for questioning, he may under 32 C. F. R. §1642.4(a) be declared a delinquent and classified or reclassified I-A." 372 F. 2d at 821.

The question here, therefore, is whether the possession requirement of Reg. 1617.1 is the kind of "duty" which, if not performed, can be the basis for delinquency and reclassification. We believe it is not.

The principal responsibility of local boards is to select young men for induction into the armed forces. "Classifica-

[14] We pass the question whether this language meets the test of specificity required for criminal statutes.

tion is the key to selection . . . ", Reg. 1622.1(b), and the key to classification is "pertinent" information. Reg. 1622.1 (b).

The regulations empower the boards to secure this information in a variety of ways. Reg. 1641.7(b) requires every registrant "to keep his local board currently informed of his occupational, marital, family, dependency, and military status, of his physical condition, of his home address, of his receipt of any professional degree in a medical, dental or allied specialist category." Changes in any of these conditions must be reported within ten days of their occurence. Reg. 1647(b) requires every registrant to "submit to his local board in writing all information which the local board may at any time request from him concerning his occupational, marital, family, dependency, or military status or his physical condition or his receipt of a professional degree."

Reg. 1622.1(b) provides that "the mailing by the local board of a Classification Questionnaire (SSS Form 100) . . . shall be notice to the registrant that unless information is presented to the local board . . . which will justify his deferment or exemption from military service the registrant will be classified in Class I-A." Furthermore, "the local board shall proceed with the registrant's classification and classify him whenever (1) he fails to return his Classification Questionnaire . . . , or (2) he fails to provide the local board with any other information concerning his status which he is requested or required to furnish." Reg. 1623.1 (b). In addition, "The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally reexamined, employers may be required to furnish information, police officials or

other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants." Reg. 1625.1(c). Finally, local boards are authorized to receive information from state and local welfare and governmental agencies. Reg. 1621.14.

Information being the key to classification, the local board must have some device by which to secure that information from uninformative registrants. That device is the delinquency procedure. Regs. Part 1642.

Delinquency, properly viewed, is analogous to civil contempt. It is designed not to punish for past acts, but to coerce compliance with the procedures of the system leading up to classification. Delinquency status says to the registrant: until you bring yourself into compliance with the rules designed to enable your local board to ensure that you are properly classified, you will be treated as having waived all the benefits of the System's procedures, and therefore as available for immediate induction.

The delinquency regulations explicitly provide for the expunging of delinquency—indeed, they relax the ordinary rule that a reopening of classification cannot be had after an order to report for induction, thereby allowing the registrant to conform to the requirements of Selective Service procedure right up to the last moment. Reg. 1642.14(b). The registrant is not bound by his waiver of the System's procedural rights until he is actually in the armed forces. Up until the very last moment he can, by cooperating with the procedures which enable his local board to make appropriate classification decisions, receive consideration of his claim that he should not be considered available for imme-

diate induction. *Ibid.* The "Delinquency Notice" itself requests the registrant to contact his local board at once—obviously with an eye to clearing up the alleged default.

Possession by a registrant of his registration certificate plainly has nothing to do with the ability of a local board to perform its classification function. In no way is the board's consideration of the propriety of a registrant's current classification (or a classification he claims), or its ability to maintain official contact with him, impeded or affected by whether or not he happens to possess the required document.

It follows from the fact that the possession requirement is not an integral part of the relationship between a local board and its registrants, that to use reclassification as a sanction to enforce the requirement is to use it as punishment—not as mere "civil" enforcement of the rules of the classification procedure.

Acts unrelated to the classification process itself may be crimes under the Act. As such, they may well be punishable—after a fair trial, before an impartial judicial tribunal, with all of the required procedural safeguards and rights. They may not, under the Regulations, the Act, or the Constitution, be punished in summary proceedings appropriate only for "civil" enforcement of the rules of the classification process.[15]

c. Certiorari should be granted to decide whether the delinquency regulations are impermissibly vague and overbroad.

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[15] Should certiorari be granted, petitioner would also explore the power of a local board to strip petitioner of the mandatory exemption contained in Sec. 6(g) of the Act.

Reg. 1642.4(a), *supra*, p. 5, authorizes declarations of delinquency (and consequent I-A classification and priority induction, Regs. 1642.12, 1642.13) of a registrant who "has failed to perform any duty or duties required of him under the Selective Service law. . . ." As construed by respondents in this case, the regulation can be applied to punish a registrant for exercising First Amendment rights.

An examination of the regulations demonstrates that the delinquency provisions are designed to serve a discrete purpose. In addition to serving as a device for securing information needed for intelligent classification (see Sec. 2(c), *supra*, p. 20), the "duties required" under Reg. 1642.4 (a) would seem to be limited to such things, for example, as the duty to return the Classification Questionnaire within 10 days (Reg. 1621.10), the duty to correct an inadequate Questionnaire (Reg. 1621.13), and the duty to report for physical examination (Reg. 1628.16). But as we have seen, the regulation is in fact capable of being construed to include not only the alleged "duty" to possess his registration certificate owed by petitioner, but also the kind of "duty" said to have been owed by the appellants in *Wolff* v. *Selective Service, supra*. According to General Hershey, it could, and should, be construed also to include the "duty" not to violate the Act in its entirety, as well as its "related processes", or to perform acts "under unfortunate influences of misdirected emotions . . . or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation. . . ." App., *infra*, p. 10a.

A statute or regulation which lends itself to such broad interpretation runs afoul not only of the general rule against vague statutes, see, e.g., *Cramp* v. *Board of Education*, 368

U. S. 278 (1961), but also the rule in *Dombrowski* v. *Pfister, supra,* which condemns statutes with an "overbroad sweep . . . which lend themselves too readily to denial of [First Amendment] rights." 380 U. S. at 486.

d. Certiorari should be granted to decide whether the punitive reclassification of petitioner violates the due process clause of the Fifth Amendment.

Kennedy v. *Mendoza-Martinez,* 372 U. S. 144 (1963), spells out the criteria to be used to measure whether administrative sanctions are to be denominated penal or regulatory.[16] Though not all the *Mendoza-Martinez* criteria apply to the facts of this case, enough of them do to warrant this Court's plenary examination of the question, for if petitioner's induction is to be denominated punishment, the absence of due process in the Selective Service System would infect petitioner's induction in the same way as the absence of due process fatally infected the expatriation in *Mendoza-Martinez.*

Of the *Mendoza-Martinez* criteria, at least four clearly apply here.

(1) Induction "involves an affirmative disability or restraint." This could hardly be gainsaid, in light of the well-

[16] "The punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character, even though in other cases this problem has been extremely difficult and elusive of solution. Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . ." 372 U. S. at 168-169.

recognized facts of military life; indeed, the availability of *habeas corpus* to secure release from the armed forces, *Eagle* v. *United States ex rel. Samuels*, 329 U. S. 304 (1946), necessarily rests upon such an hypothesis.

(2) Induction premised upon delinquency "comes into play only on a finding of *scienter*." The Act makes it an offense to "knowingly" fail or neglect to perform a required duty. Sec. 12(a)(b). This Court has imposed the same criminal *mens rea* requirement upon liability for delinquency status, reclassification, and induction consequent thereon. *Bartchy* v. *United States*, 319 U. S. 484 (1943).

(3) Punitive reclassification followed by induction is designed to "promote the traditional aims of punishment—retribution and deterrence." The delinquency notice (SSS Form 304) resolves any doubt on this score, for it informs the delinquent registrant that unless he brings himself into conformity with his duties under the Act and Regulations, he will be liable to reclassification to Class I-A or to prosecution. One is at a loss to imagine any functions other than deterrence and retribution which might be served by taking a registrant out of a classification in which he otherwise belongs—like IV-D (ministerial), IV-F (unfit for service), II-S (student), or III-A (dependency)—and reclassifying him for immediate induction into the armed forces.

(4) "[T]he behavior to which [punitive reclassification and induction] applies is already a crime," under Section 12(b) of the Act.

If the Court should hold that petitioner's induction is punishment, it would then be obliged to decide whether the punishment was imposed with due process of law. We believe the Court could not but conclude that due process

is entirely absent from the procedures leading to petitioner's induction.

(1) *Counsel.* In Selective Service proceedings, including punitive reclassifications by which it is sought to impose induction as a punishment, there is no right to the assistance of any counsel, let alone to appointed counsel. Cf. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). Reg. 1642.1(b) states: "No registrant may be represented before the local board by anyone acting as attorney or legal counsel." Compare *United States* v. *Capson*, 347 F. 2d 959 (CA 10), cert. denied, 382 U. S. 911 (1965).

(2) *Confrontation and Cross-Examination.* No such rights are provided for in the Regulations, and Reg. Part 1624 ("Appearance before Local Board") plainly does not contemplate a hearing in which a registrant accused of a violation can confront and cross-examine his accusers. See *Harris* v. *Ross*, 146 F. 2d 355 (5th Cir. 1944).

(3) *Compulsory Process.* Not only is this right not affirmatively enforced in Selective Service proceedings, but the Regulations explicitly provide that it is wholly within the discretion of a Local Board to decide whether to "*permit* any person to appear before it with or on behalf of a registrant. . . ." Reg. 1642.1(b). It has been held that a registrant has no constitutional or statutory right to have witnesses before his local board. See, e.g., *Uffleman* v. *United States*, 230 F. 2d 297 (9th Cir. 1965), *Harris* v. *Ross*, 146 F. 2d 355 (5th Cir. 1944).

(4) *Self-Incrimination.* In the classification process the burden is on the registrant to establish his eligibility for a deferment or exemption. Regs. 1622.1(c), 1622.10, 1623.2. A registrant is bound to provide all required information,

to notify his board of any change in his circumstances, and to answer such further questions as his board may ask. Reg. 1625.1; Act Sec. 15(b). After a registrant receives SSS Form 304, the "Notice of Delinquency," it is entirely up to him to exonerate himself if he can. Unless he persuades the local board that he was not "guilty," he will quickly be inducted.

(5) *Burden of Proof.* Since Selective Service procedure in effect puts the burden of proving his innocence upon the accused registrant, this requirement is not met in delinquency proceedings. See Regs. 1622.1(e), 1622.10.

(6) *An Impartial Tribunal.* With one minor exception (Reg. 1604.55), no "change of venue" or "disqualification for bias" is available under Selective Service procedure.

(7) *Public Trial.* Selective Service procedures do not contemplate anything but secret proceedings. Reg. Part 1624.

(8) *Jury Trial.* No such right is afforded in the Selective Service System.

As the Court observed in *Mendoza-Martinez,* "If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further." 372 U. S. at 167.

e. Certiorari should be granted to decide whether Reg. 1617.1 (*supra,* p. 4), which requires "personal possession" of one's Registration Certificate, as construed and applied in this case, violates the First Amendment.

In *O'Brien* v. *United States,* No. 232, this Court now has before it the constitutionality of that portion of Section 12(b) of the Miltary Selective Service Act of 1967 which

forbids the knowing destruction of registration certificates. Though there is some relationship between destruction and non-possession, counsel in *O'Brien* pointed out that the distinctions were not "systematically presented and argued below by either side" (Brief for David Paul O'Brien, p. 68), and asked that the question be remanded should the Court be disposed to rule upon it at all.

The *O'Brien* brief points out a few of the different arguments available on behalf of the unconstitutionality of Reg. 1617.1, *viz.*, whether there was proper delegation of the power to enact such a regulation; whether the Selective Service System has the power to require virtually all adult male citizens to carry the equivalent of an internal passport; and whether there is a constitutionally significant difference between the validity of such a requirement as applied to a peaceful protest context as opposed to a scheme to defraud.

In addition to those questions, there is, of course, the question whether violation of the possession requirement, in the context of this case, can validly be made the basis for reclassification and induction, regardless of whether it can be the basis for prosecution.[17]

f. Certiorari should be granted to decide whether the Selective Service Regulations were violated in this case.

An administrative agency is bound to follow its own regulations. *Service* v. *Dulles*, 354 U. S. 363 (1967); *Estep* v. *United States*, *supra* at 121. Respondent Local Board No. 11 violated the regulations in this case by mailing petitioner his delinquency notice and notice of I-A classification on the same day, November 7, 1967 (R. 3).

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[17] See *United States* v. *Wills*, No. 765, petition for cert. filed October 25, 1967.

The orderly procedure contemplated by the delinquency regulations is clear: (1) information comes to the attention of the local board indicating that a registrant is delinquent; (2) the local board declares that that is the effect of the information, and notifies the registrant; (3) the registrant is afforded a reasonable time to clear up the matter [see Reg. 1642.4(c)]; (4) only if, after a reasonable time, the board "has not removed him from such delinquency status" may it proceed to reclassify him based upon his delinquency status. Reg. 1642.12. This is a clear and simple procedure, and in it SSS Form 304 performs the indispensable function of notice. SSS Form 304 is itself perfectly explicit as to its purpose. It tells the registrant why he has been placed in delinquency status, it directs him to communicate at once with his local board or to seek advice from the local board nearest him, and it notifies him that his alleged breach, if not cleared up, may result in a I-A classification or in prosecution.

On no view can the actions of respondent Local Board No. 11, be held to have complied with the simple, straightforward notice requirement of the Regulations. Petitioner received his delinquency notice and notice of reclassification on the same day. Both notices were mailed the same day (November 7, 1967). The notice of delinquency required by the Regulations was deprived of any function whatsoever. How could petitioner clear up the matter with his local board, as SSS Form 304 required him to do to avoid being reclassified I-A? A delinquency notice is exactly what the Regulations call it—a "Notice"—and to function as such it must precede by a reasonable time the action of the local board which has immediate consequences, namely, reclassification.

This Court said of a similar procedural error, "This is not an incidental infringement of technical rights. Petitioner has been deprived of . . . a fundamental safeguard, and he need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to complain of the deprivation." *Simmons* v. *United States*, 348 U. S. 397, 406 (1955).

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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March 19, 1968.

APPENDIX

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 9902—JANUARY TERM, 1968

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

JAMES J. OESTEREICH,

Appellant,

—v.—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 11, Cheyenne, Wyoming, SELECTIVE SERVICE APPEAL BOARD FOR THE STATE OF WYOMING, COL. JACK P. BRUBAKER, Wyoming Selective Service Director,

Appellee.

MELVIN L. WULF (JOHN GRIFFITHS, LAWRENCE R. VELVEL, JOHN A. KING, and WILLIAM REYNARD were with him on the brief), *for Appellant.*

ROBERT V. ZENER, Attorney, Department of Justice (Edwin L. Weisl, Jr., Assistant Attorney General, Robert N. Chaffin, United States Attorney, and Morton Hollander, Attorney, Department of Justice, were with him on the brief), *for Appellee.*

Before:

LEWIS, BREITENSTEIN and HICKEY,
Circuit Judges.

PER CURIAM:

The judgment is affirmed for the reasons set forth in the memorandum decision of the trial court and particularly in view of the jurisdictional restrictions contained in 50 App. U. S. C. §460(b)3. Orderly classification of a registrant for military service is not punitive in nature. Compare United States v. Capson, 10 Cir., 347 F. 2d 958. Appellant is not denied his right to ultimate judicial review of his claimed rights. Witmer v. United States, 348 U. S. 375 377.

Order Setting Aside Prior Orders and Dismissing Plaintiff's Action

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

No. 5194 Civil.

JAMES J. OESTEREICH,

Plaintiff,

—VS.—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 11, Cheyenne, Wyoming, SELECTIVE SERVICE APPEAL BOARD FOR THE STATE OF WYOMING, COL. JACK P. BRUBAKER, Wyoming Selective Service Director,

Defendants.

The above-entitled matter having come on regularly for hearing before the Court on January 22, 1968, plaintiff appearing by and through his counsel, John A. King and Melvin L. Wulf, and defendants appearing by and through Robert N. Chaffin, United States Attorney for the District of Wyoming, and LeRoy Amen, Assistant United States Attorney for the District of Wyoming, and the Court having heard the oral arguments of counsel for plaintiff and of counsel for defendants, and having carefully examined the record on file herein, including the pleadings and the affidavits of plaintiff and his counsel, and having examined the brief submitted by plaintiff's counsel and having studied

the authorities relied upon by plaintiff's counsel and by counsel for defendants, and being fully advised in the premises, FINDS:

1. The prior Orders made and entered herein on January 22 and 23, 1968, are inconclusive and non-determinative of the issues raised by the pleadings and fail properly to adjudicate the rights of the parties herein, and should be set aside.

2. Plaintiff's pleading filed herein on January 19, 1968, contains no caption to identify his action. For the purposes of the hearing thereon and of this Order, said pleading is treated as a complaint and a motion for a temporary restraining order.

3. Plaintiff's jurisdictional allegations are mere conclusions unsupported by factual allegations in the complaint and his assertions of federal jurisdiction are unsubstantial, frivolous and without merit. His complaint fails to satisfy the jurisdictional requirements of 28 U. S. C. 1331, 1343, and 2201 in the following particulars:

a. Plaintiff's action does not arise under the Constitution, laws or treaties of the United States. His complaint contains no allegations of facts that defendants subjected him to unreasonable, arbitrary or invidious discrimination, or that he was deprived of his constitutional rights under the First, Fifth, and Sixth Amendments of the Constitution of the United States. Federal jurisdiction is not conferred by the mere assertion of constitutional rights unsupported by factual allegations.

b. Plaintiff's allegation that the matter in controversy exceeds the value of $10,000.00 exclusive of in-

terest and costs is made only for the purpose of invoking the jurisdiction of this court. Plaintiff seeks no monetary damages and does not allege facts which are determinative of the value of the rights sought to be gained by his action. His complaint and argument are concerned with intellectual freedom rather than with economic loss. The failure of jurisdiction of this court under 28 U. S. C. 1331 appears on the face of the complaint for its failure to allege facts showing that the matter in controversy exceeds the sum or value of $10,000.00 exclusive of interest and costs, or to show facts from which such jurisdictional requirement may be inferred.

c. Sub-sections (1) and (2) of 28 U. S. C. 1343 are inapplicable to confer jurisdiction on this court for the reason that plaintiff does not seek to recover damages. Sub-section (3) of 28 U. S. C. 1343 is likewise inapplicable as no state statute, law, ordinance, regulation, custom or usage is involved in this action. Subsection (4) of 28 U. S. C. 1343 confers jurisdiction only where an Act of Congress providing for the protection of civil rights is involved and no such Act of Congress is relied upon by plaintiff. Hence 28 U. S. C. 1343 does not support the jurisdiction of this court over plaintiff's action.

d. 28 U. S. C. 2201 does not establish a new basis for jurisdiction of federal courts, but provides a new remedy merely. It requires diversity of citizenship and the statutory jurisdictional amount in controversy to confer jurisdiction on this court. Plaintiff and defendant Col. Jack P. Brubaker are citizens of the State of Wyoming. Plaintiff alleges no monetary damages and

asserts no value on the rights he seeks to protect by this action. This Court, therefore, lacks jurisdiction under 28 U, S. C. 2201 for plaintiff's failure to satisfy the requirements of diversity of citizenship and jurisdictional sum or value in controversy.

4. This Court has no jurisdiction to grant judicial review of the classification or processing of the plaintiff by the local board, the appeal board, or the President. Plaintiff does not challenge his classification as a defense to a criminal prosecution, and he has not responded either affirmatively or negatively to the order of December 27, 1967, to report for induction. The statutory conditions of Public Law 90-40 approved June 30, 1967, 81 Stat. 100, Section 8 (c), 50 App. U. S. C. Section 460 as amended, are not satisfied. Congress may grant or withhold judicial review of administrative action except when required by the Constitution. Estep v. United States, 327 U. S. 114 (1946).

5. Plaintiff fails to allege that there is no basis in fact for the 1-A classification assigned to him. Neither does he allege that defendants acted in an arbitrary or capricious manner in re-classifying him, nor that defendants discriminated against him by such re-classification.

6. Defendants are arms of the Executive branch of the United States Government, and their performance of their duties imposed upon them by the Universal Military Training and Selective Service Act is not subject to the supervision of or direction by the Judicial Department. This Court has no jurisdiction to encroach upon the discretion vested in defendants in the performance of their responsibilities under the Act. To assume jurisdiction over plain-

tiff's action would violate the fundamental constitutional precept of separation of powers of the Executive and Judicial Departments of the United States.

7. Plaintiff knowingly violated the law and the regulation requiring him to have his registration certificate in his possession at all times.

8. The exempt status claimed by plaintiff and the classification assigned to him are matters of legislative and executive grace. Exemptions and classifications are a privilege, not an inalienable right conferred by the constitution or statute. Absent positive allegations of arbitrary or capricious acts, defendants have the right and duty to exercise their informed discretion and classify plaintiff without interference by the judiciary.

9. Plaintiff's allegations that the declaration of delinquency, the re-classification, and the order of induction are punitive in nature, imposed as a penalty, are unsubstantiated conclusions of fact; they are merely illusory conclusions and opinions based on conjecture. The administrative action taken by defendants does not constitute penal action as it does not subject plaintiff to criminal punishment.

10. Section 2282 of 28 U. S. C. providing for a court of three judges is not applicable unless questions are raised in the complaint as to the constitutional validity of an Act of Congress. It does not apply to administrative orders or action. It confines its requirement for a court of three judges to cases where an Act of Congress is attacked upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States. Plaintiff's action

does not attack any act of Congress on constitutional grounds and raises no substantial question of constitutional validity of the Universal Military Training and Selective Service Act. Plaintiff's action challenges the validity of the administrative action with regard to his individual induction status; his prayer only, challenges the validity of the regulations under the Universal Military Training and Selective Service Act. Plaintiff's action raises no substantial question of constitutional validity as to the Act itself. Plaintiff's complaint, therefore, is not within 28 U. S. C. 2282 providing for the convocation of a three-judge District Court. William Jameson & Co. v. Morgenthau, 307 U. S. 171 (1939); Sardino v. Federal Reserve Bank of New York, et al., 2 Cir., 361 F. 2d 106 (1966).

Now, THEREFORE, IT IS ORDERED that the Order of this Court made and entered herein on January 22, 1968, denying temporary restraining order and dismissing complaint, and the Order Nunc Pro Tunc made and entered herein on January 23, 1968, dismissing the complaint of the plaintiff, be, and the same are hereby, set aside.

IT IS FURTHER ORDERED that plaintiff's motion for temporary restraining order and plaintiff's complaint, together with the cause, be, and the same are hereby, dismissed for the reasons stated herein, the parties to pay their own costs.

Dated this 6th day of February, 1968.

EWING T. KERR
Judge.

New York Times, Thursday, November 9, 1967

Texts of Letter and Memo on the Draft

Special to The New York Times

WASHINGTON, Nov. 8—Following is the text of a letter, dated Oct. 26, to all members of the Selective Service system from the director of Selective Service Lieut. Gen. Lewis B. Hershey, and of a memorandum, dated Oct. 24, from General Hershey on draft cards:

The Letter

The basic purpose and the objective of the Selective Service system is the survival of the United States. The principal means used to that end is the military obligation placed by law upon all males of specified age groups. The complexities of the means of assuring survival are recognized by the broad authority for deferment from military service in the national health, safety, or interest.

Important facts, too often forgotten or ignored, are that the military obligation for liable age groups is universal and that deferments are given only when they serve the national interest. It is obvious that any action that violates the military selective service act or the regulations, or the related processes cannot be in the national interest.

It follows that those who violate them should be denied deferment in the national interest. It also follows that illegal activity which interferes with recruiting or causes refusal of duty in the military of naval forces could not by any stretch of the imagination be construed as being in support of the national interest.

The Selective Service system has always recognized that it was created to provide registrants for the armed forces,

rather than to secure their punishment for disobedience of the act and regulations. There occasionally will be registrants, however, who will refuse to comply with their legal responsibilities, or who will fail to report as ordered, or refuse to be inducted. For these registrants, prosecution in the courts of the United States must follow with promptness and effectiveness. All members of the Selective Service system must give every possible assistance to every law enforcement agency and especially to United States attorneys.

It is to be hoped that misguided registrants will recognize the long-range significance of accepting their obligations now, rather than hereafter regretting their actions performed under unfortunate influences of misdirected emotions, or possibly honest but wholly illegal advice, or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation and the preservation of the liberties of each of our citizens.

Demonstrations, when they become illegal, have produced and will continue to produce much evidence that relates to the basis for classification and, in some instances, even to violation of the act and regulations. Any material of this nature received in national headquarters or any other segment of the system should be sent to state directors for forwarding to appropriate local boards for their consideration.

A local board, upon receipt of this information, may reopen the classification of the registrant, classify him anew, and if evidence of violation of the act and regulations is established, also to declare the registrant to be a delinquent and to process him accordingly. This should include all registrants with remaining liability up to 35 years of age.

If the United States Attorney should desire to prosecute before the local board has ordered the registrant for induction, full cooperation will be given him and developments in the case should be reported to the state director and by him to national headquarters.

Evidence received from any source indicating efforts by nonregistrants to prevent induction or in any way interfere illegally with the operation of the Military Selective Service Act or with recruiting or its related processes, will be reported in as great detail as facts are available to state headquarters and national headquarters so that they may be made available to United States attorneys.

Registrants presently in classes IV-F or I-Y who have already been reported for delinquency, if they are found still to be delinquent, should again be ordered to report for physical examination to ascertain whether they may be acceptable in the light of current circumstances.

All elements of the Selective Service system are urged to expedite responsive classification and the processing of delinquents to the greater possible extent consistent with sound procedure.

MEMORANDUM

Subject: Disposition of Abandoned or Mutilated Registration Certificate and Notices of Classification.

1. Whenever an abandoned or mutilated registration certificate or current notice of classification reaches a local board, and the card was originally issued to a registrant by some other board, it should be forwarded to the state director of selective service, who will forward it to the appropriate local board if within the state, or the appro-

priate state director if the board of origin is outside the state.

2. Whenever a local board receives an abandoned or mutilated registration certificate or current notice of classification which had been issued to one of its own registrants, the following action is recommended:

(A) Declare the registrant to be delinquent for failure to have the card in his possession.

(B) Reclassify the registrant into a class available for service as a delinquent.

(C) At the expiration of the time for taking an appeal, if no appeal has been taken, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States attorney for prosecution.

(d) If appeal is taken and the registrant is retained in a class available for service by the appeal board, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States Attorney for prosecution.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1246

JAMES J. OESTEREICH, PETITIONER

v.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 11, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

Regulations of the Selective Service System authorize local boards to reclassify as a delinquent any registrant who "has failed to perform any duty or duties required of him under the selective service law * * *" (32 C.F.R. 1642.4(a)), and require that such a delinquent be given the highest priority for induction into the Armed Forces (32 C.F.R. 1631.7(a)(1)). In the instant case, petitioner, on November 7, 1967, was placed in a delinquency status by his local Selective Service board on two grounds: (1) "failure to have in his possession a duly authorized Registration Certificate (SSS Form 2)," and (2) "failure to provide the local board [with notice] of his current status" (R. 3). On the same day, petitioner, who previously

had a IV–D classification as a theological student, was reclassified as I–A. After an unsuccessful administrative appeal, he was ordered to report for induction.

Subsequently, this action, seeking to restrain petitioner's induction, was filed in the District Court for the District of Wyoming (where petitioner's local board is located). The district court dismissed the complaint, citing the prohibition of pre-induction judicial review contained in Public Law 90–40 (50 U.S.C. App. 460(b)(3), as amended, 81 Stat. 100), and failure to comply with the $10,000 jurisdictional amount required by 28 U.S.C. 1331 (Pet. App. 3a–8a). The court of appeals affirmed in a brief opinion (Pet. App. 1a–2a), and denied an application for a stay pending review in this Court. On March 5, 1968, Mr. Justice White granted a stay of the judgment below, conditioned on the filing of a petition for certiorari by March 19, 1968.

I

This portion of the government's memorandum restates the views which were presented to the courts below and is responsive to the contentions advanced by petitioner. The case involves, however, a serious additional question, which is discussed in Part II, *infra*.

1. Both courts below held that the present action is barred by a provision of Public Law 90–40, which prohibits judicial review of any Selective Service classification prior to induction. The relevant portion of the statute (81 Stat. 100, amending 50 U.S.C. App. 460(b)(3)) reads as follows:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

Under this statute, a registrant must either refuse induction and risk criminal prosecution, or submit to induction and seek a writ of habeas corpus, in order to obtain judicial review.[1] While this scheme undeni-

[1] Public Law 90–40 does not explicitly preserve the habeas corpus remedy. However, the law prior to 1967 (when P.L. 90–40 was adopted) clearly permitted habeas corpus as a means of testing the validity of an induction order. *Witmer* v. *United States*, 348 U.S. 375, 377; *United States ex rel. Reel* v. *Badt*, 152 F. 2d 627 (C.A. 2); *United States ex rel. Samuels* v. *Pearson*, 151 F. 2d 801 (C.A. 3). The legislative history of P.L. 90–40 makes it plain that Congress intended to preserve the generally prevailing law with respect to judicial review of Selective Service classifications (H. Rep. No. 267, 90th Cong., 1st Sess., pp. 30–31). In addition, the statute provides for review after the registrant has responded "affirmatively" to the induction order; such review could only be by habeas corpus, since in these circumstances there would be no basis for a criminal prosecution. There would be room for doubt as to the constitutional validity of a reading of the statute which would abolish habeas corpus as a means of contesting an induction order. U.S. Constitution, Art. I. Sec. 9.

ably requires a registrant to incur a serious risk in order to obtain review of his draft classification, Congress has determined that the need for postponing judicial review in such situations outweighs any countervailing considerations.[2] Public Law 90–40 was designed "to prevent litigious interruptions of procedures to provide necessary military manpower" (113 Cong. Rec. S8052 (June 12, 1967) (Sen. Russell); see *Falbo* v. *United States*, 320 U.S. 549, 551–554). Indeed, if pre-induction review were generally available, many men could be expected to bring suit in the hope of avoiding, or at least postponing, military service. Postponement of judicial review serves the national interest in preventing delays in the induction process, and the rights of the individual can be vindicated through the availability of post-induction review. Congress has thus struck a balance consistent with the Constitution.[3]

Petitioner argues that Public Law 90–40 cannot be validly applied to cases in which First Amendment

[2] Habeas corpus petitions must, of course, be accorded precedence on a court's calendar (see 28 U.S.C. 2243), thus keeping the registrant's time in service at a minimum if the court should rule the induction illegal. Until such a final ruling, there would be a strong argument against staying inductions, even absent the explicit provisions of P.L. 90–40. Since the draft board's quota must in any event be filled, a preliminary injunction against the induction of a registrant who has filed suit would have the consequence of causing the induction of some other individual to take his place.

[3] A similar problem was involved during World War II under the Emergency Price Control Act, in which Congress prohibited temporary injunctions against price control regulations. This provision was sustained in *Yakus* v. *United States*, 321 U.S. 414, 441.

issues are raised, since the burdens involved in obtaining judicial review within the confines of the statute would result in a "chilling effect" on First Amendment rights. *Dombrowski v. Pfister*, 380 U.S. 479, 487–489. However, the conditions which led this Court in *Dombrowski* to hold that an injunctive suit was available there to vindicate First Amendment rights are not present here. In *Dombrowski*, a crucial circumstance was that the plaintiffs were not assured a "prompt judicial resolution of First Amendment claims" in connection with the normal means of judicial review (380 U.S. at 489). That is not the situation here. If review is by habeas corpus, the case must receive precedence on the district court's calendar (see note 2, *supra*). And any criminal prosecution resulting from a refusal to submit to induction is required by the statute to be accorded precedence over other cases (see 50 U.S.C. App. 462(a), 462(c), as added by P.L. 40, 81 Stat. 100). Moreover, reclassification here was predicated on the violation of defined duties imposed upon Selective Service registrants: the duty to carry the registration certificate at all times (32 C.F.R. 1617.1), and the duty to keep the local board informed of the registrant's status (32 C.F.R. 1641.7). Resolution of the First Amendment questions involved in this case, unlike those in *Dombrowski*, would not require a "series of * * * criminal prosecutions" (380 U.S. at 489).

2. Petitioner's principal First Amendment claim is that the delinquency regulations are impermissibly broad and, as drafted, readily lend themselves to a denial of First Amendment rights. These regulations authorize reclassification of a registrant who "has

failed to perform any duty or duties required of him under the selective service law * * *" (32 C.F.R. 1642.4(a)). This language simply incorporates the provisions of the Selective Service law and regulations imposing certain duties on registrants, and petitioner has not shown that any of those provisions are impermissibly vague. Certainly the duties involved in this case—the duty to carry a registration certificate at all times (32 C.F.R. 1617.1) and the duty to keep the local board informed of the registrant's status (32 C.F.R. 1641.7)—are narrowly defined and are not subject to a charge of vagueness. The regulations imposing these duties were the basis for the local board's action here. Thus, the fact that broader statements appear in General Hershey's letter of October 26, 1967 (Pet. App. 9a–11a) is not relevant to this case.

Petitioner also argues that the requirement in the regulations that registrants keep their registration certificates in their possession at all times (32 C.F.R. 1617.1) violates the First Amendment, at least as applied to registrants whose surrender of their certificates is intended as a form of political protest or "symbolic speech." However, the "possession" requirement has been upheld against First Amendment challenge by every court of appeals which, expressly or impliedly, has considered the question. See *United States* v. *Miller*, 367 F. 2d 72 (C.A. 2), certiorari denied, 386 U.S. 911; *United States* v. *Kime*, 188 F. 2d 677 (C.A. 7), certiorari denied, 342 U.S. 823; *Wills* v. *United States*, 384 F. 2d 943 (C.A. 9), pending on petition for certiorari, No. 765, this Term; see also *O'Brien* v. *United States*, 376 F. 2d 538 (C.A. 1),

certiorari granted, 389 U.S. 814. Congress clearly has the power to raise armies (U.S. Const. Art. I, Sec. 8), and may do so through a draft system that requires registration of all men over 18. Perhaps such a system could be operated without requiring registrants to carry their registration certificates. But the conclusion that a nationwide registration system in a country with a large transient population would work more effectively with such a requirement is hardly unreasonable. See *United States* v. *Miller, supra*, 367 F. 2d at 80–81.

3. Petitioner's remaining contentions do not involve the First Amendment and thus, even under petitioner's view of Public Law 90–40, would not appear to be a proper subject for pre-induction judicial review.

a. Petitioner attacks his reclassification as a delinquent on the ground that it constitutes the imposition of punishment without the procedural protections afforded by the Bill of Rights in connection with criminal prosecutions. Induction into the Armed Forces is not, however, a penal sanction. See *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168–169. While military service undoubtedly involves hardship and restraint, it also represents a duty commonly owed by all citizens. The delinquency regulations are designed as an administrative means of insuring that the registrant complies with the duties he personally owes to his local board and the Selective Service System—and to the public generally. Since they seek to render self-defeating any attempt by the registrant to cut himself off from contact with the Selective Service

System, these regulations are basically remedial rather than punitive in nature. Indeed, the primary purpose of delinquency reclassification is to bring the registrant back into compliance with his duties. Until the moment of induction, the registrant has the opportunity to have his delinquency status changed if he corrects his default, and a delinquent registrant who has been reclassified I-A may be restored to his prior classification without the restrictions against reopening classifications which would otherwise be applicable (see 32 C.F.R. 1642.4(c), 1642.14). In essence, the delinquency regulations are analogous to the civil contempt sanction since they are a means whereby the Selective Service System may facilitate its operation by compelling registrants to perform their duties under the pertinent laws and regulations.

Petitioner apparently agrees with this characterization of the delinquency regulations (see Pet. 23-24). He argues, however, that those regulations should apply only to duties pertaining to the classification and induction process, and that possession of a registration certificate is not pertinent to that process. However, registration is a necessary, preliminary step to classification and induction. The requirement of possession of a registration certificate is calculated to make the entire system operate more effectively (see *supra*, pp. 6-7).

We recognize that whether an administrative reclassification amounts to the imposition of a penalty might in some circumstances present a substantial question. Thus, in *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817 (C.A. 2), on which

petitioner relies (Pet. 12–14, 21), the court of appeals concluded that "it is not the function of local boards in the Selective Service System to punish * * * registrants by reclassifying them 1-A because they protested * * * the Government's involvement in Vietnam" (*Wolff, supra,* at 822). But the situation here differs from that involved in *Wolff,* where the registrants who were reclassified had engaged in a demonstration at the local draft board offices in protest against American involvement in Vietnam (see *id.* at 820). In the instant case, unlike the situation in *Wolff,* petitioner was reclassified because of his failure to comply with pertinent Selective Service regulations and not because of any protest activity as such.

By their terms, the delinquency regulations are applicable only where an individual "has failed to perform any duty or duties required of him" under the Selective Service statutes and regulations (32 C.F.R. 1642.4(a)). As the court in *Wolff* noted, while it was alleged and "could * * * be claimed" that the conduct engaged in constituted action hindering or interfering with the administration of the Selective Service System (372 F. 2d at 821), "no regulation authorizes a draft board to declare a registrant a delinquent or to reclassify him for such action" (*ibid.*). The instant petitioner was in violation of a specific, continuing duty imposed upon him by the regulations; the duty involved in *Wolff,* if any, was neither specific nor continuing, nor affirmative in nature. Thus, unlike the registrants in *Wolff,* petitioner could have corrected his violation at any time (see *supra,* p. 8).

b. Petitioner also contends that his reclassification violated the procedure required by the regulations (32 C.F.R. 1642.4, 1642.10), on the ground that there was no lapse of time between the Notice of Delinquency and the Notice of Classification. The purpose of such a time lapse would have been to permit petitioner to correct his status. However, petitioner had ample opportunity to do so—over six weeks elapsed between the date on which his Notice of Classification was mailed (November 7, 1967) and the date on which his induction order was mailed (December 27, 1967). During this period, the local board had the authority to reopen his classification at any time without regard to restrictions otherwise applicable, and petitioner had the right to a personal appearance before his local board and an administrative appeal (32 C.F.R. 1642.4 (c), 1642.14). Petitioner did not correct his delinquency during this period, and there is no reason to believe that an additional few days or weeks between the Notice of Delinquency and the Notice of Classification would have changed the situation. There was thus no prejudice. See *Wills* v. *United States*, *supra*.

4. In reclassifying petitioner as a delinquent, his local board cited not only his failure to keep his registration certificate in his possession, but also his "failure to provide the local board [with notice] of his current status" (R. 3). Petitioner's complaint made no allegations with reference to this ground for the local board's decision, although in order to overturn the administrative action, he is under the

burden of showing that all grounds of decision are invalid. None of petitioner's constitutional arguments is applicable to this ground, and the delinquency regulations—even under petitioner's analysis (Pet. 20–24)—authorize a delinquency reclassification on this ground.

II

Quite apart from the validity of the arguments made above, there is a further problem in this case. Although the issue is not advanced directly by counsel for petitioner, it is apparent on the face of the record. It does not appear to be a matter which can be appropriately overlooked.

In this case, petitioner's exemption from military service and training is one which has been granted to him by Act of Congress. Section 456(g) specifically provides that—

> students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools * * * shall be exempt from training and service (but not from registration) under this title.

Petitioner is a full-time student in good standing at the Andover Newton Theological School, which is a "recognized theological or divinity school."[4] Thus, he is exempt by the terms of the statute from "training and service" under the Selective Service Act. What Selective Service System Local Board No. 11 has done

[4] The Solicitor General has confirmed these facts.

here is to terminate, by administrative action, the exemption which has been granted by statute. If that action was contrary to the express terms of the Act of Congress granting the exemption, this is obviously relevant in considering the application of the procedural provision on which the government has relied in this case.

This issue does not necessarily involve the constitutional validity of the provision of Public Law 90–40 relied on by the courts below. That statute forbids "judicial review * * * of the classification or processing of any registrant by local boards," except in defense to a criminal prosecution. It is possible to construe this language as applicable to the generality of situations where the local board has applied its judgment, but to exclude purported action of a board which is in fact contrary to an exemption which has been expressly granted by statute. Such a construction is not only possible here, but it is desirable in order to avoid conflict with the congressional determination to grant exemption to ministers and ministerial students. In this situation it may be observed that there is room for an appropriate distinction between an order which is contrary to the terms of a statute and an order which is subject to challenge only on the ground that the board has misapplied or abused its authority in making its judgment. Cf. *Harmon* v. *Brucker*, 355 U.S. 579, 581–582; *Leedom* v. *Kyne*, 358 U.S. 184, 188.

Of course, the question of the board's power to disregard the statute could be raised in defense to a criminal prosecution, or in a habeas corpus proceeding

after induction. This, however, is a very heavy burden to put on the citizen if the board has in fact acted contrary to the terms of the statue—which is the situation here, as we read the Act of Congress relating to the exemption of divinity students, and the other statutes involved. This question is central to this case, quite apart from other questions which have been raised.

The Solicitor General submits these views for the consideration of the Court. It is his position that, in the light of the facts in this particular case, and in the interest of justice, the judgment below should be reversed, and the cause remanded with directions to hold a hearing as to the presence of the jurisdictional amount required by 28 U.S.C. 1331[5] and if, jurisdiction under that section is found, to enter a decree in favor of petitioner on the basis of his acknowledged status as an exempt ministerial student.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1968.

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[5] Here the trial court held that there was no federal jurisdiction because the jurisdictional amount required by 28 U.S.C. 1331 was not established (see *supra*, p. 2). See *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817, 826 (C.A. 2); *Giancana* v. *Johnson*, 335 F. 2d 366 (C.A. 7), certiorari denied, 379 U.S. 1001. However, the complaint alleged that the amount in controversy exceeds $10,000 and, while no supporting facts are alleged, the remainder of the complaint does not negate the possibility that $10,000 may be involved. Since the defendants did not contest the allegation of jurisdictional amount, it would appear that the trial court should not have dismissed on this basis without first giving petitioner an opportunity to make more specific allegations and offer proof on this score.

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OCTOBER TERM, 1968

No. 46

JAMES J. OESTEREICH,

Petitioner,

—v.—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 11, Cheyenne, Wyoming, SELECTIVE SERVICE APPEAL BOARD FOR THE STATE OF WYOMING, COLONEL JACK P. BRUBAKER, Wyoming Selective Service Director,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Shaughnessey v. Pedreiro, 349 U. S. 48 (1955) 11, 21
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Shillitani v. United States, 384 U. S. 364 (1966) 53
Simmons v. United States, 348 U. S. 397 (1955) 65, 68
Smith v. Flinn, 261 F. 2d 781 (8th Cir. 1958) 38
Speiser v. Randall, 357 U. S. 513 (1958) 32
Spevack v. Klein, 385 U. S. 511 (1967) 62
St. Joseph Stockyard v. United States, 298 U. S. 38 (1936) 9, 20, 27
Steinert v. Clark, Civil No. 48654 (N. D. Cal.) 17
Stromberg v. California, 283 U. S. 359 (1931) 14, 71, 80

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Tamarkin v. Selective Service System, 243 F. 2d 108 (5th Cir. 1957) 43
Tomlinson v. Hershey, 95 F. Supp. 72 (E. D. Pa. 1949) 44
Townsend v. Zimmerman, 237 F. 2d 376 (6th Cir. 1956) 43-44, 65
Tumey v. Ohio, 273 U. S. 510 (1927) 62
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Uffleman v. United States, 230 F. 2d 297 (9th Cir. 1956) 61
United Mine Workers v. Illinois State Bar Assn., 389 U. S. 217 (1967) 77
United States v. Brown, 381 U. S. 437 (1965) 59
United States v. Burlich, 257 F. Supp. 906 (S. D. N. Y. 1966) 65
United States v. Capson, 347 F. 2d 959 (10th Cir.), cert. denied 382 U. S. 911 (1965) 60
United States v. Eisdorfer, No. 67 Cr. 302 (E. D. N. Y. June 24, 1968) 47, 53
United States v. Hayman, 342 U. S. 205 (1952) 44
United States v. Hertlein, 143 F. Supp. 742 (E. D. Wisc. 1956) 59
United States v. Kime, 188 F. 2d 677 (7th Cir. 1951), cert. denied 342 U. S. 825 (1951) 59
United States v. Miller, 367 F. 2d 72 (2d Cir. 1966), cert. denied 386 U. S. 911 (1967) 81, 82
United States v. Stiles, 169 F. 2d 455 (3d Cir. 1948) 66
United States v. Sturgis, 342 F. 2d 328 (3d Cir.), cert. denied 382 U. S. 879 (1965) 60
United States v. Thompson, D. C. Mass., 1 S. S. L. R. 3059 (1968) 66, 67
United States v. Vincelli, 215 F. 2d 210, reh. denied 216 F. 2d 681 (2d Cir. 1954) 65, 66

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United States v. Willard, 211 F. Supp. 643 (N. D. Ohio 1962) 44

Vitarelli v. Seaton, 359 U. S. 535 (1959) 64

Watkins v. Rupert, 224 F. 2d 47 (2d Cir. 1955) 43
White v. Swenson, 261 F. Supp. 42 (W. D. Mo. 1966) 44
Whitney v. California, 274 U. S. 357 (1927) 14, 72
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Woo v. United States, 350 F. 2d 992 (9th Cir. 1965) 43
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Worstell v. Selective Service Local Bd. No. 7, Civ. Action No. 68-456 (W. D. Pa.) 18

Yakus v. United States, 321 U. S. 414 (1944) 9, 22, 23, 27, 30

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28 U. S. C. §2241 44
28 U. S. C. §2254 41
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Federal Regulations:
6 Fed. Reg. 1796 (March 31, 1941), Amendment No. 22 87
7 Fed. Reg. 2086 (Feb. 15, 1942), Amendment No. 21, 2d Ed. 88
7 Fed. Reg. 9683 (Nov. 23, 1942), Amendment No. 101, 2d Ed. 87, 88
7 Fed. Reg. 9773 (Nov. 23, 1942), Amendment No. 102, 2d Ed. 88, 89, 91

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Section 623.61-3 91

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1918 Regulations:
Section 279 90

Selective Service Regulations, Second Edition, First Printing 437 (1944) 89

Selective Service Regulations:
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Regulation 1604.62 [32 C. F. R. §1604.62] 62
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Regulation 1642.14 [32 C. F. R. §1642.14] 54, 62

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Miscellaneous:

Amsterdam, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. Rev. 67 (1960) 74

Byse and Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308 (1967) 93

Cong. Record, Vol. 113 (June 12, 1967):
S. 8052 43

4 Davis Administrative Law Treatise:
§28.18 (1958) 21
§30 38

Dranitzke, The Possession of Registration Certificates and Notices of Classification by Registrants Under the Selective Service System, 1 S. S. L. R. 4029 (1968) 85

Enforcement of the Selective Service Law, Selective Service System Special Monograph No. 14, 56 (1951) 56, 86, 87, 92

Enforcement of the Selective Service Law, Selective Service System Special Monograph No. 18, 122 (1967) 90

Finman & Macaulay, Freedom to Dissent: The Viet Nam Protests and the Words of Public Officials, 1966 Wis. L. Rev. 632 70

Griffiths, Some Notes on the Solicitor General's Memorandum in Oestereich, 1 Selective Service Law Reporter 4012 (1968) 39

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Hart and Wechsler, The Federal Courts and the Federal System 312 (1953) 21, 22
House Report No. 267, Committee on Armed Services 7 43
"In Pursuit of Equity: Who Serves When Not All Serve?," Report of the National Advisory Commission on Selective Service 29 (1967) 63
Jaffe, Judicial Control of Administrative Action 587 (1956) 64
Jaffe, The Right to Judicial Review I, 71 Harvard Law Review 401 (1958) 21
Jaffe, The Right to Judicial Review II, 71 Harvard Law Review 769 (1958) 21
Kamin, Residential Picketing and the First Amendment, 61 Northwestern U. L. Rev. 177 (1966) 70
Layton and Fine, "The Draft and Exhaustion of Administrative Remedies," 56 Geo. L. J. 315 (1967) 34
N. Y. Times, December 30, 1967, p. 2 16
Note, Fairness and Due Process Under the Selective Service System, 114 U. Pa. L. Rev. 1014 (1966) 65
Note, 81 Harv. L. Rev. 685 (1967) 34, 45
Note, 114 U. Pa. L. Rev. 1014 (1966) 61
Selective Service System, Legal Aspects of Selective Service 7 (1963) 55, 62
Supp. No. 18, Justice Department Circular No. 3421 to United States Attorneys, dated October 18, 1943 .. 56
Velvel, Freedom of Speech and The Draft Card Burning Cases, 16 Kan. L. Rev. 149 (1968) 70, 81

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 46

JAMES J. OESTEREICH,

Petitioner,

—v.—

SELECTIVE SERVICE SYSTEM LOCAL BOARD No. 11, Cheyenne, Wyoming, SELECTIVE SERVICE APPEAL BOARD FOR THE STATE OF WYOMING, COLONEL JACK P. BRUBAKER, Wyoming Selective Service Director,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The Order of the United States District Court, District of Wyoming (A. 13-18), is reported at 280 F. Supp. 78. The opinion of the Court of Appeals for the Tenth Circuit (A. 20) is reported at 390 F. 2d 100.

Jurisdiction

The judgment of the Court of Appeals was entered on February 21, 1968. The petition for certiorari was filed on March 19, 1968 and was granted on May 20, 1968. The jurisdiction of this Court rests on 28 U. S. C. §1254(1).

Statutes and Regulations Involved

Section 10(b)(3), Military Selective Service Act of 1967; 50 App. U. S. C. §460(b)(3):

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

Section 6(g), Military Selective Service Act of 1967; 50 App. U. S. C. §456(g):

> "Ministers of religion.—Regular or duly ordained ministers of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been preenrolled shall be exempt from training and service (but not from registration) under this title."

Selective Service Regulation 1617.1; 32 C. F. R. §1617.1:

"Effect of failure to have unaltered registration certificate in personal possession.—Every person required to present himself for and submit to registration must, after he has registered, have in his personal possession at all times his Registration Certificate (SSS Form 2) prepared by his local board which has not been altered and on which no notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. The failure of any person to have his Registration Certificate (SSS Form 2) in his personal possession shall be prima facie evidence of his failure to register. When a registrant is inducted into the armed forces or enters upon active duty in the armed forces, other than active duty for training only or active duty for the sole purpose of undergoing a physical examination, he shall surrender his Registration Certificate (SSS Form 2) to the commanding officer of the joint examining and induction station or to the responsible officer at the place to which he reports for active duty, and such certificate shall be destroyed by the officer to whom it is surrendered."

Selective Service Regulation 1642.4(a); 32 C. F. R. §1642.4(a):

"Declaration of Delinquency Status and Removal Therefrom.—(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form 252) or the duty to comply with an Order to Report for

Civilian Work and Statement of Employer (SSS Form 153), the local board may declare him to be a delinquent."

Questions Presented

Petitioner, a student preparing for the ministry, was exempt from training and service in the Armed Forces under Section 6(g) of the Military Selective Service Act of 1967 [50 App. U. S. C. §456(g)]. Upon returning his Selective Service Registration Certificate to the government as a statement of protest against the war in Vietnam, petitioner was declared delinquent under the Selective Service regulations, stripped of his exemption, reclassified I-A and ordered to report for induction. Under these circumstances:

1. Does Section 10(b)(3) of the Military Selective Service Act of 1967 [50 App. U. S. C. §460(b)(3)] preclude judicial review of petitioner's punitive reclassification and order to report for induction?

2. Does the declaration of delinquency, punitive reclassification, and induction of petitioner for failure to have his Registration Certificate in his personal possession, violate the due process clause of the Fifth Amendment, the Military Selective Service Act of 1967, and the Selective Service Regulations?

3. Does Selective Service Regulation 1617.1 [32 C. F. R. §1617.1], as construed and applied in this case, and Selective Service Regulation 1642.4(a) [32 C. F. R. §1642.4(a)] on its face, violate the First Amendment?

4. Does a registrant in fact violate Regulation 1617.1 if he does not have his Registration Certificate in his personal possession?

Statement of the Case[1]

Petitioner is a duly enrolled student "preparing for the ministry" at Andover-Newton Theological School, Newton Centre, Massachusetts, a "recognized theological or divinity school." Military Selective Service Act of 1967, Sec. 6(g), 50 App. U. S. C. Sec. 456(g) [hereinafter "Act"]; 32 C. F. R. Sec. 1622.43(a)(4) [hereinafter "Regs."]. As such, he was classified IV-D by Local Board No. 11 on June 20, 1966 and thus exempt from military service (A. 3).

On October 16, 1967, together with numerous other persons, petitioner returned his Selective Service registration certificate (SSS Form 2) to the United States Government solely for the purpose of registering his dissent from participation by the United States in the war in Vietnam (A. 3). Petitioner, by affidavit, explained in detail his reasons for returning his registration certificate. He described it as "an act of collective conscience in support of our dying and suffering brothers who are presently fighting on our behalf in Vietnam," and "a responsible expression of concerned citizens, acting in light of the first amendment." His act was based upon his "understanding of the claims which the Christian faith brings to bear on the human situation" including the belief that "man responds to God's revelation by concrete participation in the structures and

[1] The Statement of the Case is based upon the allegations in the complaint, taken as admitted upon the government's motion to dismiss. *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480 (1947).

decisions of life, with a transcending loyalty to the will of God, the authority of the scriptures, and the community of interpretation which is the church," and in his belief in the doctrine of the "Just War". He stated his belief that "the Viet Nam situation reveals this war to be in violation of most of the criteria of the just war doctrine and is a major threat to the security and peace of the world" (A. 7-11).

On November 7, 1967, Local Board No. 11 mailed petitioner a Delinquency Notice (SSS Form 304) informing him that he "became delinquent" on October 20, 1967. The Delinquency Notice advised petitioner that he was delinquent for the following reasons: (1) "Failure to have in his possession a duly authorized Registration Certificate (SSS Form 2)" and (2) "Failure to provide the local board of his current status" (A. 4).[2]

Simultaneously, on November 7, 1967, Local Board No. 11 mailed petitioner a Notice of Classification (SSS Form 110) reclassifying him I-A (A. 4).[3] Petitioner duly appealed his I-A reclassification to the Selective Service Appeal Board for the State of Wyoming which unanimously affirmed the classification on December 27, 1967.[4] On the same day, December 27th, Local Board No. 11 mailed petitioner an order to report for induction in Cheyenne, Wyoming, at 3:00 P.M. on January 24, 1968 (A. 4).[5]

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[2] The Delinquency Notice is reproduced in the Appendix, *infra*, p. 2a.

[3] Class I-A indicates that a registrant is "Available for Military Service." Reg. 1622.10.

[4] Thereby exhausting administrative remedies (A. 4).

[5] Petitioner's place of induction was subsequently transferred, pursuant to Reg. 1632.9, to Dorchester, Massachusetts, and postponed to February 26, 1968.

On January 19, 1968, suit was filed in the United States District Court for the District of Wyoming to enjoin petitioner's induction into the armed forces. Oral argument was heard on January 22, 1968, on petitioner's application for a temporary restraining order. After oral argument, respondents' Motion to Dismiss was granted from the bench. An order dismissing the action was entered that day (R. 23-24), a subsequent *nunc pro tunc* order was entered on January 23, 1968 (R. 25), and an Order Setting Aside Prior Orders and Dismissing Plaintiff's Action was entered on February 6, 1968 (A. 13-18).

The District Court's February 6th order found, among other things, that the action did "not arise under the Constitution, laws or treaties of the United States" (A. 14), that the matter in controversy did not exceed $10,000 (*ibid.*), that there was no diversity of citizenship (A. 15), that it was divested of jurisdiction because of Sec. 10(b)(3) of the Act (A. 15-16), that "to assume jurisdiction over plaintiff's action would violate the fundamental constitutional precept of separation of powers . . ." (A. 16), that petitioner knew that he was required to have his registration certificate in his possession at all times (*ibid.*), that "exemptions and classifications are a privilege, not an inalienable right conferred by the Constitution or statute" (A. 16-17), and that the action complained of "does not constitute penal action" (A. 17).

Notice of Appeal was filed on February 6, 1968 (R. 34), and an expedited appeal was heard by the Tenth Circuit on February 19, 1968. On February 21, 1968, the Court of Appeals affirmed the decision below in a *per curiam* decision which reads in its entirety as follows:

"The judgment is affirmed for the reasons set forth in the memorandum decision of the trial court and particularly in view of the jurisdictional restrictions contained in 50 App. U. S. C. §460(b)(3). Orderly classification of a registrant for military service is not punitive in nature. Compare United States v. Capson, 10 Cir., 347 F. 2d 958. Appellant is not denied his right to ultimate judicial review of his claimed rights. Witmer v. United States, 348 U. S. 375, 377."

An application for a stay was denied by the Tenth Circuit on February 23, 1968. On the same day an application to stay petitioner's induction was presented to Mr. Justice White. On March 5, 1968, after the government had agreed to the postponement of petitioner's induction to allow time for consideration of the stay application, Mr. Justice White issued an order staying "the execution and enforcement of the judgment of the United States District Court for the District of Wyoming, as affirmed by the United States Court of Appeals for the Tenth Circuit . . ." on the condition that this petition for certiorari be filed on or before March 19, 1968. The petition was filed on that date.

In his Memorandum for Respondents, the Solicitor General took the position that the Court should reverse the judgment below and, subject to establishment of the requisite jurisdictional amount, direct that a decree be entered in petitioner's favor. The position was based on the Solicitor General's acknowledgement that the Local Board had deprived petitioner of a mandatory exemption granted by Congress in Sec. 6(g) of the Act and that the Sec. 10 (b)(3) prohibition of pre-induction judicial review ought to be construed "to exclude purported action of a board

which is in fact contrary to an exemption which has been expressly granted by statute" (Memorandum for Respondents, p. 12).[6]

Summary of Argument

I. The Federal Courts Have Jurisdiction to Hear and Determine This Suit.

A. *Effective Judicial Review of the Classification Orders of Local Boards Is Constitutionally Required.*

The Constitution requires judicial review of the orders and actions of administrative agencies. *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94 (1902); *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1967); *St. Joseph's Stockyard* v. *United States*, 298 U. S. 38 (1936). *Lockerty* v. *Phillips*, 319 U. S. 182 (1943); and *Yakus* v. *United States*, 321 U. S. 414 (1944), which are often cited as examples of extreme judicial deference to congressional efforts to preclude judicial review of agency action, in fact stand for the

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[6] The Memorandum for Respondents also adverts to the fact that petitioner was declared delinquent and reclassified I-A not only for turning in his Registration Certificate but also for his "Failure to provide the local board of his current status," and says that "to overturn the administrative action, [petitioner] is under the burden of showing that all grounds of decision are invalid" (pp. 10-11). Beyond the fact that it is improbable that this case would have gone as far as it has simply because of petitioner's failure to notify his Local Board that he was enrolled in a recognized divinity school, Local Board No. 11 was advised of petitioner's current status as a divinity student when it was served with the complaint in this case and again when, by letter dated April 17, 1968, petitioner's school so informed the Board. Furthermore, the Solicitor General, Attorney for Respondents, personally "confirmed" the fact that petitioner "is a full-time student in good standing at . . . . a 'recognized theological or divinity school'" (Memorandum for Respondents, p. 11), thus purging that aspect of petitioner's delinquency.

proposition that there must be a preliminary opportunity to contest the constitutionality of an administrative order in civil proceedings prior to facing criminal charges for its violation.

Ex Parte Young, 209 U. S. 123 (1908); and *Oklahoma Operating Company* v. *Love*, 252 U. S. 331 (1920), both require judicial review at an earlier stage than as a defense to a criminal prosecution where the penalty for being wrong is so great as to deter challenge to the validity of agency action.

Petersen v. *Clark, et al.*, Civil No. 47888 (N. D. Cal. 1968), held Section 10(b)(3) unconstitutional on the ground that "judicial review cannot be conditioned on the risk of incurring a substantial penalty or complying with an invalid order." The case also holds that "allowing civil review in advance of criminal prosecution would not disrupt the Selective Service System."

B. *In Cases Where a Board Order Affects Rights Safeguarded by the First Amendment, the Federal Courts Have Jurisdiction to Protect Those Rights.*

Even if Section 10(b)(3) is not unconstitutional in the generality of cases, it should be held inapplicable in the present case where it is the interest of the First Amendment which is at stake. Petitioner having been punitively reclassified because of his protest against the war, to allow him to raise his claims only in a criminal prosecution, effectively nullifies his First Amendment rights and deters the exercise of those rights by others. *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Wolff* v. *Selective Service*, 372 F. 2d 817 (2d Cir. 1967).

C. *The "Special Circumstances" of This Case Require Judicial Review.*

Notwithstanding legislative efforts to preclude or defer judicial review of administrative orders, the "special circumstances" rule has been applied to allow review where an administrative agency has exceeded its jurisdiction or where strict application of the statutory limitations on judicial review will result in needless detention or prosecution. The application of that rule is appropriate here where the local board exceeded its jurisdiction. To require that petitioner needlessly run the risk of criminal prosecution or detention in order to establish that the Local Board exceeded its jurisdiction warrants application of the "special circumstance" rule. *Leedom* v. *Kyne,* 358 U. S. 184 (1958); *Lipke* v. *Lederer,* 259 U. S. 557 (1922); *Harmon* v. *Brucker,* 355 U. S. 579 (1958); *Wolff* v. *Selective Service, supra; Shaughnessey* v. *Pedreiro,* 349 U. S. 48 (1955); *Rusk* v. *Cort,* 369 U. S. 367 (1962).

D. *Congress, in Enacting Section 10(b)(3), Did Not Intend to Bar Suit Such as the Present One.*

In adopting Section 10(b)(3), Congress intended only to codify existing law including cases like *Wolff* v. *Selective Service, supra,* and others which recognize a broader scope of judicial review in the Selective Service area. The argument that Section 10(b)(3) reflects displeasure with *Wolff* v. *Selective Service* and the intent to overrule it, can be found to be consistent with the exhaustion and justiciability aspects of *Wolff* rather than with the repudiation of its constitutional base.

II. The Declaration of Delinquency, Punitive Reclassification and Order to Report for Induction in This Case Are Invalid.

A. *Petitioner's Reclassification Is Contrary to an Exemption Expressly Granted by Statute.*

Administrative agency action which flies in the face of explicit statutory language is a nullity. *Estep* v. *United States,* 327 U. S. 114 (1946); *Leedom* v. *Kyne, supra; Harmon* v. *Brucker, supra; Quaid* v. *United States,* 386 F. 2d 25 (10th Cir. 1968). Consequently, withdrawal of petitioner's IV-D classification, conferred by statute, is invalid.

B. *Punitive Reclassification Is Not Authorized by Statute.*

The Act makes no provision for induction as a summary punishment for breach of duties under Selective Service law. "Without exclusive action by lawmakers, decisions of great constitutional import and effects would be relegated by default to administrative suits . . . and not endowed with authority to decide them." *Greene* v. *McElroy,* 360 U. S. 474 (1959).

C. *Punitive Reclassification Is Not Authorized by the Regulations.*

Selective Service Regulations do not provide for reclassification and induction as a punishment for the breach of duties under Selective Service law. The sole function of the delinquency procedure is to secure information required by local boards to enable them intelligently to perform their classification function. Delinquency is analogous to civil contempt. Regulation 1617.1 cannot be enforced through the delinquency procedure because the possession

requirement does not serve the information gathering function of the delinquency procedure. Application of the delinquency procedure to enforce Reg. 1617.1 is to use that procedure as a form of criminal contempt designed to punish for past acts, rather than as civil contempt to secure compliance with the Regulations.

D. *Punitive Reclassification Is Unconstitutional.*

The use of the delinquency Regulation in this case and petitioner's subsequent reclassification and induction is punishment. *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144 (1963). Consequently, the procedures leading up to petitioner's order to report for induction are unconstitutional because punishment cannot be imposed without procedural due process of law including the right to counsel, confrontation and cross-examination, compulsory process, privilege against self-incrimination, an impartial tribunal, a public trial, and a jury trial, none of which were available to petitioner.

E. *Local Board 11 Did Not Follow the Procedure for Punitive Reclassification Required by the Regulations and by Due Process.*

By concurrently declaring petitioner to be a delinquent and reclassifying him I-A, Local Board 11 violated Selective Service Regulations and due process of law. The purpose of a delinquency notice is to afford a registrant reasonable time to clear up his delinquency status and to avoid reclassification into I-A. But simultaneous reclassification deprives the delinquency notice of any function whatsoever. The opportunity to have a I-A classification removed is not the same as the right to show in advance that there is no occasion to reclassify to I-A.

III. Petitioner's Act of Returning His Registration Certificate to Local Board No. 11 Was Conduct Protected by the First Amendment.

A. *Peaceful Conduct Which Is Relevant to the Issue Giving Rise to the Protest Is Speech Protected by the First Amendment.*

Symbolic conduct must be considered speech if it is peaceful and if it is relevant to the issue giving rise to the symbolic protest. The proposed rule permits courts to draw a sensible balance between the need for an ordered society and a need to serve the vital functions of the First Amendment. Those functions consist of insuring that there is a free market place of ideas, *Abrams* v. *United States,* 250 U. S. 616 (1919), to insure that the government will be responsive to the wishes of the people, *Stromberg* v. *California,* 283 U. S. 359 (1931), and to preserve a stable and just society by enabling citizens to express their grievances in a peaceable way. *Whitney* v. *California,* 274 U. S. 357 (1927).

B. *Under the Tests for Determining When Speech May Be Abridged, the Surrender of Draft Cards Cannot Be Penalized.*

1. Reg. 1642.4(a) Upon Which Petitioner's Delinquency, Reclassification, and Induction Order Are Based Is Vague and Overbroad.

Reg. 1642.4(a) upon which petitioner's delinquency, reclassification, and induction order are based is vague and overbroad. Under Reg. 1642.4(a), not only petitioner's conduct, but other conduct unarguably protected by the First Amendment, has been the basis for delinquency and reclassification. The Regulation, therefore, runs afoul of the

rule which condemns statutes or regulations with an "overbroad sweep . . . [which] lend themselves too readily to denial of [First Amendment] rights." *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964); *Cox* v. *Louisiana*, 379 U. S. 536 (1965).

2. Plaintiff Is Being Unlawfully Punished Under Past and Present Interpretations of the Balancing Test.

O'Brien v. *United States*, 88 S. Ct. 1673 (1968), appears to indicate that, although First Amendment conduct cannot be regulated unless it poses *some* danger to a compelling government interest, the degree of danger need not be *substantial* in order for the government to have the right to regulate the conduct. Application of this standard to peaceful symbolic conduct opens the door to government repression of many kinds of speech—pure and symbolic. However, *O'Brien* v. *United States* also held that a restriction on speech can be no greater than is essential to further a legitimate government interest. The restriction on speech at issue in the case at bar is greater than necessary because the government can run an effective Selective Service System even though a few registrants have surrendered their Registration Certificates. Though the administrative benefits flowing from enforcement of the possession regulation are inconsequential [*Carrington* v. *Rash*, 380 U. S. 89 (1965); *Rinaldi* v. *Yeager*, 384 U. S. 305 (1966)], the "continuing availability" of surrendered cards leaves those benefits undisturbed.

IV. There Is in Fact No Independent Requirement of Personal Possession of Registration Certificates.

Tracking the history of Selective Service Regulation 1617.1 to World War I, establishes that non-possession of a Registration Certificate is not a violation of the Regulations in itself, but is only prima facie evidence of another act which is a violation of the Regulations and of the Act, i.e., non-registration.

ARGUMENT

Introduction

Petitioner's registration certificate was one of 357 draft cards which were returned to the government at a demonstration at the Department of Justice on October 20, 1967 (Washington Post, January 25, 1968), and an additional 297 draft cards returned the next day during a demonstration at the Pentagon (N. Y. Times, December 30, 1967, p. 2).

On October 24, 1967, General Lewis B. Hershey, the Director of Selective Service, issued a memorandum to all local draft boards recommending the reclassification and induction of registrants who abandon their Selective Service registration certificates or notices of classification. Appendix, *infra*, p. 1a. Two days later, General Hershey, in a letter addressed to all draft boards, encouraged the reclassification and induction of any registrant who, among many other things, "violates the military Selective Service Act or the Regulations, or the related processes . . . ". *Ibid.*

The local boards responded promptly and affirmatively. Though counsel cannot say precisely how many registrants

have been declared delinquent, stripped of their deferments or exemptions, reclassified I-A, and ordered for priority induction into the armed forces, we have personal knowledge of no less than seventy-six plaintiffs in eighteen lawsuits who, having either been declared delinquent, or declared delinquent and reclassified I-A, are subject to priority induction or have received induction orders.[7] *Linzer, et al.* v. *Selective Service System Local Board No. 64, et al.*, No. 68 C 110 (E. D. N. Y.); *Woods et al.* v. *Selective Service Board No. 3 et al.*, No. 68 C 350 (E. D. N. Y.); *Kimball, et al.* v. *Selective Service Local Board No. 15, et al.*, No. 67/4733 (S. D. N. Y.); *Bucher, et al.* v. *Selective Service System, et al.*, No. 12, 26/67 (D. N. J.); *Collis* v. *Selective Service Local Board No. 28*, No. C-67-19-M (N. D. W. Va.); *Anderson, et al.* v. *Hershey, et al.*, No. 30729 (E. D. Mich.); *Steinert, et al.* v. *Clark, et al.*, Civil No. 48654 (N. D. Cal.); *Decker, et al.* v. *Selective Service Board No. 25*, Civil No. 49348 (N. D. Cal.); *Anderson* v. *Clark, et al.*, Civil No. 48869 (N. D. Cal.); *Goldsmith* v. *Hershey, et al.*, Civil No. 49281 (N. D. Cal.); *Kolden* v. *Selective Service Local Board No. 4*, No. 6-68-64 Civil (D. Minn.); *Breen* v. *Selective Service Local Board No. 16*, No. 12422 (D. Conn.); *Turley* v. *Selective Service System Local Board No. 134*, No. 68-290-F (C. D. Cal.); *Huey* v. *Selective Service Local Board No. 22, et al.*, No. C-225-67 (C. D. Utah);[8] *Connor*,

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[7] A "delinquent" *may* be classified I-A. Reg. 1642.12. If a delinquent is reclassified I-A, he *shall* be ordered to report for induction. Reg. 1642.13. I-A delinquents stand at the top of the order of call and are to be inducted before all other draftees. Reg. 1631.7.

[8] Huey was reclassified I-A delinquent not for turning in his draft card but for participating "in a peaceful public demonstration near the Armed Forces Entrance and Examination Station at 438 South Main Street, Salt Lake City, Utah, for the sole purpose of expressing publicly his dissent from American involvement in the Vietnam War." *Huey* Complaint, p. 2. *Huey* is an example of the

et al. v. *Selective Service Local Board, et al.*, No. Civ. 1968 —33 (W. D. N. Y.); *Colfax* v. *Selective Service System Local Bd. No. 11, et al.*, Civ. Action No. 68-432 (W. D. Pa.); *Worstell* v. *Selective Service System Local Bd. No. 7, et al.*, Civ. Action No. 68-456 (W. D. Pa.); *Zigmond* v. *Selective Service Local Board No. 16*, C. A. No. 68-368-G (D. Mass.).

Registrants who have been declared delinquent, declared delinquent and reclassified, or ordered to report for induction, include men in a variety of classifications. Some, like petitioner, had been exempt as ministers or students of the ministry; others had been deferred as students (Act, Sec. 6(h) and (i); Regs. 1622.25, 1622.26); a 37 year old registrant formerly classified V-A under Reg. 1622.50 as over-age, was reclassified I-A (N. Y. Times, December 20, 1967, p. 15); of the six plaintiffs in *Linzer* v. *Selective Service System, supra,* all but one of whom have been reclassified I-A, two had II-S deferments as students, one had been classified I-Y because "under applicable physical, mental, and moral standards [he is] not currently qualified for service" (Reg. 1622.17), one had been deferred in class III-A as a parent (Reg. 1622.30), one had been classified IV-A having completed his military service (Reg.

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punitive reclassification of a registrant pursuant to the Hershey letter of October 26, 1967. Appendix, *infra*, p. 1a. In *Peffers and Hess* v. *Selective Service Appeal Board*, No. 7469 (W. D. Wash.), two men were reclassified I-A and ordered for priority induction for distributing anti-war leaflets during their pre-induction physical examinations. The plaintiffs' deferments were restored by their boards only after suit was filed. On May 15, 1968, Local Board No. 10, Mount Vernon, N. Y., declared Daniel F. Connell III delinquent for "Counseling evasion of The Selective Service Law," and on June 27, 1968 reclassified him from III-A (Mr. Connell is married and has two children) to I-A. His case is on appeal to the State Appeal Board.

1622.40),[9] and one had been classified V-A as over the age of liability (Reg. 1622.50).[10]

Thus, petitioner is not a victim of an aberrant draft board. Though we do not know exactly how many men have been declared delinquent, reclassified, or ordered to report for induction, we know that the number is far greater than seventy-six.

Whatever the number of registrants who have been directly affected by the policy at issue here, equally significant is the number of registrants who have been silenced out of fear that, should they publicly protest against the war in Vietnam, they too will lose their deferred or exempt status. What is at stake, therefore, is the power of the government to present to a large number of young men the choice of surrendering their right to speak freely on questions of urgent public importance, or of suffering heavy penalties for exercising that right. Equally at issue is the power of the Selective Service System to deprive persons of exemptions granted by statute, and to impose punishment without due process of law under the capricious authority of a distorted "delinquency" procedure which is unauthorized either by statute or regulation.

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[9] The IV-A plaintiff was not reclassified I-A. Veterans may be reclassified I-A only with the authorization of the Director of Selective Service. Reg. 1642.12.

[10] As of December 31, 1967, there were 15,593,748 registrants in V-A. Selective Service, February 1968, p. 4.

I.

The Federal Courts have jurisdiction to hear and determine this suit.

A. *Effective Judicial Review of the Classification Orders of Local Boards Is Constitutionally Required.*

An essential ingredient of our Constitutional system is the requirement of judicial review of the orders and actions of administrative agencies. Accompanying the proliferation of such agencies at all levels of government, has been the concurrent development of the doctrine of judicial review, which holds that "[t]he acts of all . . . officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108 (1902). See also, *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967) (and cases cited therein). This basic principle was clearly stated by Mr. Justice Brandeis:

> "The supremacy of law demands that there shall be an opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality." *St. Joseph Stock Yards* v. *United States*, 298 U. S. 38, 84 (1936) (concurring opinion). See also, *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287 (1920).

And Professor Louis Jaffe has concluded that ". . . in our system of remedies, an individual whose interest is acutely

and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination of its validity." Jaffe, The Right to Judicial Review I, 71 Harvard Law Review 401, 420 (1958). *Cf.* Hart and Wechsler, The Federal Courts and the Federal System, 312-40 (1953).

In numerous instances congressional legislation, such as Sec. 10(b)(3) in issue here, has purported to restrict the scope or confine the availability of judicial review of administrative orders, but this Court has interpreted such provisions to avoid constitutional infirmities. See, e.g., *Lipke* v. *Lederer,* 259 U. S. 557 (1922); *Crowell* v. *Benson,* 285 U. S. 22 (1932); *St. Joseph Stock Yards* v. *United States, supra; Estep* v. *United States,* 327 U. S. 114 (1946); *Heikkila* v. *Barber,* 345 U. S. 229 (1953); *Shaughnessy* v. *Pedreiro,* 349 U. S. 48 (1955); *Brownell* v. *Tom We Shung,* 352 U. S. 180 (1956); *Leedom* v. *Kyne,* 358 U. S. 184 (1958); *Rusk* v. *Cort,* 369 U. S. 367 (1962); *McCulloch* v. *Sociedad Nacional,* 372 U. S. 10 (1963); see also, 4 Davis, Administrative Law Treatise §28.18 (1958); Jaffe, The Right to Judicial Review II, 71 Harvard Law Review 769, 770-86 (1958). Illustrative of judicial unwillingness to sanction the claim that illegal administrative action is beyond judicial scrutiny is *Estep* v. *United States,* 327 U. S. 114 (1946). Mr. Justice Douglas, writing for the Court, rejected the contention that the finality conferred upon local draft board orders by the Selective Training and Service Act of 1940 could preclude all judicial inquiry. Such orders were "final" only when they were within the board's "jurisdiction," either geographical or legal:

> "We cannot read §1[7] as requiring the court to inflict punishment on registrants for violating whatever

> orders the local board might issue. We cannot believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction." 327 U. S. at 121.

Recognizing that "[j]udicial review may indeed be required by the Constitution . . . ," the Court construed the statute so as to accord only administrative finality to the board's order and to insure a necessary measure of judicial review.

Lockerty v. *Phillips*, 319 U. S. 182 (1943), and *Yakus* v. *United States*, 321 U. S. 414 (1944), both arising under the Emergency Price Control Act of 1942, are often cited as extreme examples of judicial deference to congressional efforts to preclude federal court jurisdiction and control over the actions of administrative agencies.[11] *Lockerty* v. *Phillips* involved a suit to enjoin a threatened prosecution for violation of administrative orders under the act. The Court upheld the lower court's dismissal for want of jurisdiction. Though there is dicta in that opinion which discusses the scope of congressional control over the jurisdiction of the federal courts, 319 U. S. at 187, that extreme language has not only been criticized by scholars, see Hart and Wechsler, *supra*, at 298, but it must be read within the context of the statutory scheme which Congress had established. One aggrieved by an order by the Administrator could complain within the administrative system. But more importantly, he could then appeal to the Emergency Court of Appeals, which in its

[11] *Falbo* v. *United States*, 320 U. S. 549 (1944), is also often cited in this regard. That decision, however, was thereafter limited by the decision in *Estep* v. *United States*, *supra*.

essentials resembled an Article III court, and finally to this Court. Thus, the complainant received at least one opportunity to litigate the legality of the order in a civil proceeding and seek Supreme Court review *before* he had to become a defendant in a criminal prosecution for violation of the order. See *Lockerty* v. *Phillips*, 319 U. S. at 188-89. Cf. *Pacific Telephone and Telegraph Co.* v. *Kuykendall*, 265 U. S. 196, 204-05 (1924); *Porter* v. *Investors' Syndicate*, 286 U. S. 461, 471 (1932). Even in *Yakus* v. *United States*, *supra*, which held that one who failed to exhaust the special administrative remedies could not challenge the validity of an order as a defense to a criminal prosecution, the Court noted that there was a preliminary opportunity to contest the constitutionality of an order in civil proceedings prior to facing criminal charges for its violation.

Much more relevant here are the decisions of this Court which demonstrate that the right to effective judicial review cannot be impaired by imposing extreme burdens and penalties on the exercise of that right. Two cases which directly support this view are *Ex Parte Young*, 209 U. S. 123 (1908) and *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (1920). *Young* held that the Fourteenth Amendment's guarantee of due process required judicial review by civil suit where a State legislative scheme provided that the only way to challenge administrative rate-setting was to violate the prescribed rates and become subject to penalties up to five years in jail and a $5,000 fine. The Court recoiled at this deterrent to judicial review:

> "The necessary effect and result of such legislation must be to preclude a resort to the courts . . . for the purpose of testing its validity. The officers and employees could

> not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing . . .
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> A law which indirectly accomplishes a like result [making administrative orders conclusive] by imposing such conditions upon the right to appeal for judicial relief as work an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights." 209 U. S. at 146, 147.

The Court held that the remedy at law was so uncertain and hazardous as to require federal equity to intervene and protect constitutional rights.

The *Love* decision carried this rationale of the time at which judicial review was mandated one step further. It held that, faced with a legislative scheme similar to that in *Young*, which only allowed judicial review of administrative orders by way of defense to contempt proceedings, a federal equity court could enjoin enforcement of the orders and the imposition of fines. Mr. Justice Brandeis held that the right to judicial review could not be made contingent upon the risk of such penalties:

> "Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the act relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of these rates." 252 U. S. at 337.

Both cases establish the principle that judicial review is constitutionally required at an earlier stage than as a defense to a criminal prosecution where the penalty for being wrong will deter legitimate challenge to the constitutional validity of a statute, regulation or order.[12]

Sec. 10(b)(3) was held invalid for this very reason in *Petersen* v. *Clark, et al.*, Civil No. 47888 (N. D. Calif. 1968), in an opinion by Zirpoli, *J.*[13] In *Petersen*, the complaint alleged that the plaintiff was conscientiously opposed to

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[12] More recently, this Court held that an alien seeking to challenge an exclusion order could bring a declaratory judgment suit to avoid having to face the "odium of arrest and detention" which a habeas corpus application would involve, *Brownell* v. *Tom We Shung*, 352 U. S. 180 (1956). For other cases which displayed a similar reluctance to allow the imposition of great burdens on the right to judicial review of an illegal administrative determination, see *Rusk* v. *Cort*, 369 U. S. 367 (1962) and *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 151-154 (1967). In *Reisman* v. *Caplin*, 375 U. S. 440 (1964), a case involving attempts to resist a subpoena under the Internal Revenue laws, the Court discussed *Young* and *Love* and concluded that the legislative scheme under review was sufficiently free from burdens: "Finding that the remedy specified by Congress works no injustice and suffers no constitutional invalidity we remit the parties to the comprehensive procedure of the Code *which provides full opportunity for judicial review before any coercive sanctions may be imposed.*" (Emphasis added.) 375 U. S. at 450. See pp. 34-41, *infra*.

[13] An original and nine copies of a certified copy of the opinion have been filed with the Clerk of the Court.

participation in war in any form though willing to perform alternative service and was therefore entitled to a I-O classification under Sec. 6(j) of the Act, but that the local board had unlawfully refused to consider plaintiff's application for classification into I-O. After the plaintiff was issued an order to report for induction, he initiated a lawsuit to enjoin his induction. Unable to secure a temporary restraining order, plaintiff refused induction. The case was then referred to a statutory three-judge court on the theory that the suit challenged the constitutionality of Sec. 10(b)(3), but was thereafter remanded to one judge on the ground that the constitutionality of Sec. 10(b)(3) was "merely drawn in question," rather than challenged directly as unconstitutional, relying on *International Ladies Garment Workers Union* v. *Donnelly Garment Company*, 304 U. S. 243 (1938).

Plaintiff moved the one-judge court for an order enjoining his prosecution for failing to submit to induction and for an order holding the induction order invalid. The opinion of Judge Zirpoli followed.

As phrased by Judge Zirpoli, the issue before him involved "the specific situation where a federal administrative agency places an individual in the position of having to either: (1) comply with an allegedly invalid order when compliance may subject him to such restraint of liberty as military service entails or (2) risk criminal prosecution to judicially test the order's validity" (Opinion, p. 4).

First reviewing the power of Congress to regulate the jurisdiction of the lower federal courts, Judge Zirpoli concluded that Article III must be read in conjunction with the due process clause of the Fifth Amendment and that the latter was a limitation upon the former at least where

judicial review of administrative action was concerned. Consequently, relying upon *American School of Magnetic Healing, supra; St. Joseph Stockyards, supra; Ex Parte Young, supra; Yakus* v. *United States, supra; Estep* v. *United States, supra;* and *Crowell* v. *Benson, supra*, Judge Zirpoli concluded that "Congress cannot make selective service induction orders *un*reviewable. Due process is offended by an administrative order which demands compliance or a term of imprisonment" (Opinion, p. 14).

Proceeding to the next question, namely, whether Sec. 10(b)(3) is constitutional in confining review to criminal prosecution, Judge Zirpoli concluded that in general "judicial review cannot be conditioned on the risk of incurring a substantial penalty or complying with an invalid order" (Opinion, p. 9), but believed himself obliged, in the selective service context, to balance "the interests of the government and the individual . . . to see if what the government cannot do in other factual situations it may do when the governmental function involved is the raising of armies" (*ibid.*). He held that "allowing civil review in advance of criminal prosecution would not disrupt the Selective Service system" (*ibid.*), principally on the ground that the apprehension by the government of litigious interruptions of the induction process were baseless, that, indeed, "the court will experience a net saving in time" because "the need for a few trials will be obviated by voluntary compliance with orders which have been judicially declared valid, and some time will be saved at trials because the issue of the order's validity probably will not have to be litigated." In addition, "the need for calling and empanelling a jury will be completely eliminated." Finally, "since only the timing and not the scope of review will be affected the number of

men who will ultimately be found to have been validly classified will not be changed" (*ibid.*).[14]

Thus, there is a constitutionally protected right to judicial review and that review cannot be conditioned on harsh burdens which have the practical effect of denying any review at all. Insofar as the courts below have construed Section 10(b)(3) as placing such extreme penalties on the registrant who challenges a local board order, it would be unconstitutional.[15]

B. In Cases Where a Board Order Affects Rights Safeguarded by the First Amendment, the Federal Courts Have Jurisdiction to Protect Those Rights.

Even if Sec. 10(b)(3) is not unconstitutional in the generality of cases, we believe it should be held inapplicable

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[14] Meeting the government's argument that due process is satisfied by the availability of post-induction habeas corpus, Judge Zirpoli held that that was inadequate because the registrant must first be inducted, that induction is the equivalent of compliance with the allegedly invalid order, that the habeas remedy does not abrogate the duty to prevent the damage if possible, and that our system of justice would not tolerate deferring all "fourth or fifth amendment claims or defenses until after a factual finding that a defendant committed certain acts and require that they be raised by way of habeas corpus after confinement" (Opinion, p. 11). The Solicitor General agrees that "a habeas corpus proceeding after induction . . . is a very heavy burden to put on the citizen." Memorandum for Respondents, pp. 12-13.

[15] *Petersen* has been followed in the Northern District of California by Harris, *J.*, in *Gabriel* v. *Clark, et al.*, Civil No. 49419. In *Kolden* v. *Selective Service Local Board No. 4*, No. 19,331 (8th Cir. July 16, 1968), Blackman, *J.*, issued an injunction, pending appeal, against appellant's punitive reclassification from II-S and induction, relying on the grant at certiorari in the case at bar. Though he did not cite *Petersen*, Judge Blackman said, that "Kolden, if relief is not now granted to him, is subject to irreparable injury and that, in contrast, the appellee, if relief is granted, will be subject to little, if any, injury," thus agreeing with Judge Zirpoli's assessment that "civil review in advance of criminal prosecution will not disrupt the Selective Service System."

in the present case where it is the interest of the First Amendment which is at stake.

The concern for insuring judicial review has nowhere been more meticulous than when the rights for which the judicial power is invoked are those protected by the First Amendment. These are "preferred freedoms" which when threatened by legislative or administrative acts will be given special constitutional protection.

A review of Supreme Court decisions leaves no doubt about the primacy of First Amendment rights. The Court has expressed concern not only with direct governmental attempts to infringe those rights, but also with statutes and rules that have an indirect but deadly effect on the exercise of those rights. Of course, as is too well demonstrated by the decisions below, one of the most effective ways to destroy rights is to inhibit and frustrate the remedies available for their implementation. And it follows that the best way to cripple the remedy is to place burdensome limitations upon those who seek to exercise it. To interpret Sec. 10(b)(3) as requiring the registrant who is the object of a punitive and illegal classification and induction order, to subject himself to criminal indictment and prosecution in order to assert his claim that the board action violates his First Amendment rights, effectively nullifies those rights.

This Court has held that statutory schemes which impose an intolerable restraint and have a "chilling effect" on the exercise of First Amendment rights cannot constitutionally be allowed. See *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). *Ex Parte Young, supra,* and *Oklahoma Operating Co.* v. *Love, supra,* demonstrate that in the pro-

tection of rights of property judicial review cannot be forestalled until the point where its utilization becomes fraught with peril and hazard. *Dombrowski,* and the long line of cases it synthesized, show that rights of liberty are surely entitled to no less protection. The individual cannot be forced to choose between the Scylla of adhering to an order which may ultimately be held void or the Charybdis of disobeying an order which may ultimately be held valid. See *Yakus* v. *United States, supra* (dissenting opinion).

Dombrowski is central to this case. There, various officials of a civil rights organization were being threatened with prosecution under state statutes which appeared to be drawn in violation of the First and Fourteenth Amendments. They brought suit in the federal court seeking declarative and injunctive relief against prosecutions or the threat of the same. The suit was dismissed and this Court reversed.

After expressing its concern for considerations of federalism and noting that only "special circumstances" justify "cutting short the normal adjudication of constitutional defenses in the course of a criminal prosecution," 380 U. S. at 485, the Court pointed out that the complaint depicted a situation in which "a substantial loss or impairment of freedom of expression will occur if appellants must await the state court's disposition and ultimate review in this Court . . . " 380 U. S. at 486. Because of the "sensitive nature of constitutionally protected expression" and in light of the fact that free expression is "of transcendant value to all society," the normal rules as to standing have been relaxed in this area.

> "If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and

> tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation. Cf. Ex Parte Young. . . . [W]e have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." 380 U. S. at 487.

The Court concluded that the need for "prompt judicial resolution of First Amendment claims" outweighed considerations of federalism and justified federal jurisdiction and relief.

The parallels to the instant case are apparent. Here petitioner asserts that his punitive reclassification violates his protected constitutional rights to freedom of expression (A. 5). See Point III A, *infra*. As the court below interpreted Sec. 10(b)(3), in order to secure judicial review of the invalid induction order, petitioner must violate the law, suffer the ignominy of indictment and endure the burdens of a criminal trial. The very fact of prosecution, as the Court noted in *Dombrowski*, will have the prohibited "chilling effect" on petitioner's rights and on the rights of others who protest the Vietnam war and the draft.

The effect of such towering obstacles to judicial review on other Selective Service registrants is crucial. Few will be willing to pay such a high price for the right to dissent. The result is clear. Thousands of registrants will have fewer First Amendment rights than the rest of us. They

will have to exercise their right to lawful dissent with one eye cast on their local draft board, fearful that their activities will meet with disapproval and result in reclassification. Those with valid deferments will "steer far wider of the unlawful zone." *Speiser* v. *Randall,* 357 U. S. 513, 526 (1958). The draft boards can reclassify them I-A with impunity and dare registrants to run the hazards of criminal prosecution to prove the board wrong. In such an environment, "sensitive" constitutionally protected expression can hardly flourish as our free society demands it must.

These considerations were carefully weighed in *Wolff* v. *Selective Service,* 372 F. 2d 817 (2d Cir. 1967). Plaintiffs, registered with New York draft boards, were full-time students at the University of Michigan. As such they were classified II-S. They participated in a demonstration at a Michigan draft board, protesting the war in Vietnam. As a result they suffered the same fate as petitioner, namely, reclassification as delinquents into I-A. Claiming that such reclassification violated their rights of free speech and assembly they brought suit, prior to exhaustion of administrative remedies. The District Court dismissed the complaint for lack of a justiciable controversy and the Second Circuit reversed.

The Second Circuit found that reclassification alone posed such an immediate and irreparable injury to plaintiffs' First Amendment rights "as to require prompt action by the courts to avoid an erosion of these precious constitutional rights." 372 F. 2d at 820. The court carefully analyzed the statutes and regulations and concluded that it was not the draft board's function to punish registrants by reclassifying them for protest activities. Noting the

policy reasons which have traditionally caused judicial reluctance to interfere with the operations of the Selective Service System, the court nevertheless felt compelled to intervene:

> "Only the most weighty consideration could induce us to depart from this long standing policy. But of all constitutional rights, the freedoms of speech and of assembly are the most perishable, yet the most vital to the preservation of American democracy. Historically, these preferred and paramount rights have continually come under attack from the best intentioned sources. And once the erosion of these rights is permitted to begin, it is exceedingly difficult to halt and the intervening damage may be irreparable. Here it is the free expression of views on issues of critical current national importance that is jeopardized. On such topics perhaps more than any other, it is imperative that the public debate be full and that each segment of our society be permitted freely to express its views. Thus the allegations of the complaint in this case that the draft boards have unlawfully suppressed criticism must take precedence over the policy of non-intervention in the affairs of the Selective Service." 372 F. 2d at 822.

Finally, the court summarized the thrust of the cases leading up to *Dombrowski*:

> "It has been held repeatedly that the mere threat of the imposition of unconstitutional sanctions will cause immediate and irreparable injury to the free exercise of rights as fragile and sensitive to suppression as the freedoms of speech and assembly. . . . Since it is the

> mere threat of unconstitutional sanctions which precipitates the injury, the courts must intervene at once to vindicate the threatened liberties." 372 F. 2d at 824. (Citations omitted.)

The *Wolff* decision held that judicial relief was available to vindicate First Amendment rights threatened only by reclassification. *A fortiori* the case for judicial intervention is even greater when, as here, an induction order has already issued.

The rule which emerges is clear: where governmental action has a "chilling effect" on First Amendment rights, a federal court has jurisdiction to hear the suit and safeguard those rights. A decision which held that there can be no federal relief would raise serious constitutional questions. In order to avoid constitutional infirmities, we urge that where a board order has a "chilling effect" on registrants' First Amendment rights, the federal courts have jurisdiction to review prior to induction. Cf. *Dombrowski* v. *Pfister, supra* at 485; Note, 81 Harv. L. Rev. 685-690 (1967). Under this construction, not every board order would give rise to federal jurisdiction. For the purposes of this case it is only necessary to hold that in the exceptional case which stems from the First Amendment, the policy of orderly conscription must give way to the compulsion of the Constitution. See Layton and Fine, "The Draft and Exhaustion of Administrative Remedies," 56 Geo. L. J. 315 (1967).[16]

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[16] Nor is the thrust of this argument blunted by the assertion that, on the merits, petitioner's First Amendment claim is invalid. Whatever the disposition of his claim on the merits, he has standing to present that issue. *Dombrowski, supra,* at 485, 492; *Freedman* v. *Maryland,* 380 U. S. 51 (1965). The appellants in

C. The "Special Circumstances" of This Case Require Judicial Review.

The Solicitor General, in his Memorandum for Respondents filed in this case, urged upon the Court the view that the action of the Local Board was invalid because it was "in fact contrary to an exemption which has been expressly granted by statute" (p. 12). For that reason, said the Solicitor General, Sec. 10(b)(3) ought not be deemed a bar to this suit because "there is room for an appropriate distinction between an order which is contrary to the terms of a statute and an order which is subject to challenge only on the ground that the board has misapplied or abused its authority in making its judgment. Cf. *Harmon* v. *Brucker*, 355 U. S. 581-582; *Leedom* v. *Kyne*, 358 U. S. 184, 188" (*ibid.*). It was also the Solicitor General's view that to require petitioner to raise his defenses in a criminal prosecution or in a habeas proceeding would be "a very heavy burden to put on the citizen if the board has in fact acted contrary to the terms of the statute—which is the situation here . . . " (p. 13).

Thus, the Solicitor General has acknowledged both that the Local Board's action was invalid, and that Sec. 10

Wolff were themselves ultimately convicted in state court for the very conduct which was the basis of their reclassification, *Brothman* v. *Michigan*, 379 Mich. 776, cert. denied, 36 U. S. L. Week 3287 (January 16, 1968), but as the Second Circuit said, " . . . it is not the function of local boards . . . to punish these registrants by reclassifying them I-A because they protested as they did over the Government's involvement in Vietnam," 372 F. 2d at 822. Furthermore, *Freedman* teaches that when administrative action *may* threaten First Amendment rights, judicial review must not only be available, but that it must be quick and efficacious. *Dombrowski* goes beyond *Freedman* to hold that a civil forum must be provided if the criminal forum is fraught with peril for the right to dissent.

(b)(3) is no bar in this suit to securing judicial relief from the invalid act.

Needless to say, the Solicitor General's view is quite agreeable to petitioner. But the Court need not rely only on the parties' *entente cordiale* in order to dispose of this case on those grounds, for there is ample precedent for support in law.[17]

The Solicitor General has in effect urged the Court to adopt the "special circumstances" exception which has been applied in several areas of the law where, though legislation purports to preclude or defer judicial review of administrative orders, the courts believe immediate review to be constitutionally necessary.

In *Leedom* v. *Kyne,* 358 U. S. 184 (1958), the NLRB, acting contrary to the flat prohibition of the statute, had included professional employees within a bargaining unit without a vote of those employees. In an action brought by the Engineers Association to set aside the Board's action, the Board argued that the courts had no jurisdiction except by a petition for enforcement or review of an order restraining an unfair labor practice, as the statute provided. But the Court held:

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[17] The discussion which follows is confined to the Sec. 10(b)(3) question. It subsumes the correctness of the view that the Local Board's action was invalid. Though we subscribe to and discuss, *infra,* Point II A, the view that the Local Board's action was invalid because it is in flat contradiction to a mandatory statutory exemption, we also advance other grounds upon which that action can be held invalid. See Points II and III, *infra.* Though the Solicitor General has so far taken the position that Sec. 10(b)(3) is no bar to review only insofar as the Local Board action was contrary to the statutory exemption, our position is that any of the several invalid board practices which we describe should be reviewable in a pre-induction civil suit because each of them exceeded the Local Board's power.

"This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." 358 U. S. at 190.[18]

The Court has given similar treatment to the statute prohibiting the enjoining of tax collections. Section 3224, Revised Statutes,[19] provided that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." During prohibition, Lipke was arrested for selling liquor. While his prosecution was still pending he was served with notice that a tax was to be levied, under Sec. 35 of the Prohibition Act, upon his sale of liquor. Lipke sued for an injunction to restrain the collection of the tax. The Government argued that Sec. 3224 prevented the issuing of the injunction. This Court held that the tax sought to be levied was not a tax but a penalty, and to allow its collection would be a denial of due process because there was no provision in the Prohibition Act for a "fair opportunity for hearing." *Lipke* v. *Lederer*, 259 U. S. 557, 562 (1922). Therefore, despite Sec. 3224, an injunction should have been issued.

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[18] This "exception" for orders in excess of the Board's jurisdiction was extended to include the case of an order which caused international repercussions. *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10 (1963). Cf. *Boire* v. *Greyhound Corporation*, 376 U. S. 473, 481 (1964), which declined to apply the special circumstances rule because the issue before the court, unlike the case at bar, was "essentially a fact question;" and *Schilling* v. *Rogers*, 363 U. S. 666, 676-677 (1960), which excluded a judicial remedy under the Trading With the Enemy Act because it was not charged that the administrative official had "acted beyond the scope of his powers . . ."

[19] Now 26 U. S. C. Sec. 7421.

Since *Lipke* the Court has interpreted Sec. 3224 and its successor statutes to allow injunctions when legal remedies were insufficient. Thus in *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498 (1932), the Court held that respondent's product was not within the tax statute, that imposition of the threatened tax was "arbitrary and oppressive," and that its business would be destroyed if it were required to pay the tax. In the light of these "special and extraordinary facts and circumstances" the Court held that an injunction was proper. See also *Allen* v. *Regents*, 304 U. S. 439 (1938); *Smith* v. *Flinn*, 261 F. 2d 781 (8th Cir. 1958).

In military and draft cases the Court has also liberally construed limitations on review in order to assure equitable results. Thus, in *Harmon* v. *Brucker*, 355 U. S. 579 (1958), petitioner had been issued an other than honorable discharge from the Army because of pre-induction political activity. He brought an action to direct the issuance of an honorable discharge. The government contended that judicial review was forbidden by 38 U. S. C. §693(h) which provided that administrative determinations relating to the quality of discharges were "final". The Court rejected the contention on the ground that the Army officials had acted "in excess of [their] express or implied powers." 355 U. S. at 582.[20]

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[20] Cf. *Orloff* v. *Willoughby*, 345 U. S. 83 (1953), which is often cited as supporting unreviewability. Professor Davis notes that "The denial of review, however, is weakened by the fact that the Court also held that the applicable statute did not entitle Orloff to a commission and that 'enough appears to make plain that there was cause for refusing him a commission.'" 4 Davis, Admin. Law Treatise 30.

Wolff v. *Selective Service, supra,* itself a "special circumstance" case, noted other similar cases in the area of selective service:

> "Wholly aside from the First Amendment considerations which we believe compel our intervention at this time, it has in the past been suggested that when a local board acts in flagrant disregard of the applicable regulations and thus in clear excess of its jurisdiction, the courts may intervene at any time to rectify the situation. Thus in *Schwartz* v. *Strauss,* 206 F. 2d 767 (2 Cir. 1953), Judge Frank remarked that he had no doubt that a court would have jurisdiction to review a classification where on undisputed facts the board's lack of jurisdiction was manifest. On the merits, however, he found that the board had acted properly as a matter of law. And in *Townsend* v. *Zimmermann,* 237 F. 2d 376 (6 Cir. 1956) Judge Stewart, now Justice Stewart, enjoined a threatened induction when it appeared clearly as a matter of law that the board had violated the regulations in issuing its order." 372 F. 2d at 826.[21]

This Court has also made expansive provision for judicial review in the area of immigration law in order to avoid the need of subjecting litigants to imprisonment as a condition precedent to review. Thus, in *Shaughnessy*

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[21] Sec. 10(b)(3), which by its term precludes judicial review only of "the classification or processing of any registrant," can be read to exclude an act wholly outside a board's jurisdiction. Such a lawless act cannot be described as "classification or processing" since those terms refer only to the ordinary, authorized activities of draft boards. See Griffiths, Some Notes on the Solicitor General's Memorandum in *Oestereich,* 1 Selective Service Law Reporter 4012 (1968) (hereinafter cited as S.S.L.R.).

v. *Pedreiro,* 349 U. S. 48 (1955), the question before the Court was whether a deportation order under the Immigration and Nationality Act of 1952, in face of a provision that such orders shall be "final", could be reviewed in an action for declaratory relief under Sec. 10 of the Administrative Procedure Act. It had been held in *Heikkila* v. *Barber,* 345 U. S. 229 (1953), that review in deportation cases under the Immigration Act of 1917 was confined to habeas corpus. The Court rejected the *Heikkila* holding on the ground that "it would certainly not be in keeping with either of these Acts to require a person ordered deported to go to jail in order to obtain review by a court." 349 U. S. at 51. This holding was extended to exclusion orders in *Brownell* v. *Tom We Shung,* 352 U. S. 180 (1956), on the ground that in a declaratory judgment action "the odium of arrest and detention is not present." 352 U. S. at 183.

In *Rusk* v. *Cort,* 369 U. S. 367 (1962), appellee had ostensibly been expatriated under Sec. 349(a)(10) of the Immigration and Nationality Act of 1952 for having evaded service in the armed forces. Cort, who was living abroad, instituted an action in the District of Colombia for declaratory and injunctive relief challenging the constitutionality of Sec. 349 (a)(10). The government claimed that review was limited by Sec. 360(b) and (c) of the Act which required that claimants living abroad secure a determination of their citizenship "in habeas corpus proceedings and not otherwise." The Court rejected the contention because it concluded that Congress did not intend "that a native of this country living abroad must travel thousands of miles, be arrested and go to jail in order to attack an administrative finding . . ." 369 U. S. at 375.

In the area of habeas corpus the Court has also created exceptions to legislative restraints on judicial relief. 28 U. S. C. Sec. 2254, like Sec. 10(b)(3), deals with exhaustion of remedies, and likewise codifies an area of law previously left to the courts.

Sec. 2254 in relevant part reads:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State.

In *Fay* v. *Noia*, 372 U. S. 391, 434-435 (1963), a state prisoner sought federal habeas corpus. The prisoner and two codefendants had been convicted on the basis of a coerced confession. The two codefendants appealed in the State Court and lost, and then sought habeas corpus in Federal court and were freed. The prisoner did not appeal, but thereafter sought federal habeas corpus. The State claimed the writ should not be granted because under Sec. 2254 he had not exhausted his state remedies. This Court said that the statute "was enacted to codify the judicially evolved rule of exhaustion, particularly as formulated in *Ex Parte Hawke* . . . " Since the Court read *Hawke* to limit review only where state remedies were not *presently* available, it held "that Sec. 2254 is limited in its application to failure to exhaust state remedies still open to the habeas applicant at the time he files his application in federal court."

The conclusion which emerges from all these cases is that notwithstanding statutory limitations upon judicial review, the Court will expand those limits in cases where

official action is clearly without authority, or where strict application of the statutory limitation will require litigants needlessly to expose themselves to detention or prosecution.[22]

That, of course, describes the case at bar, for here the Local Board action is "lawless and beyond its jurisdiction,[23] and to demand that petitioner subject himself to criminal prosecution to establish that patent invalidity, is not only a needless exposure to the criminal process but also "requires the courts to march up the hill when it is apparent from the beginning that they will have to march down again."[24]

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[22] The government acknowledges that to require petitioner to raise his defenses in a criminal prosecution, or in a habeas corpus proceeding after induction, "is a very heavy burden to put on the citizen. . . ." Memorandum for Respondents, p. 13.

[23] *Estep* v. *United States, supra* at 121. Mr. Justice Frankfurter said that "The objection to judicial [review] of an unauthorized exercise of powers is not weighty," *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 157 (1951).

[24] *Estep* v. *United States, supra* at 125. There must, after all, be some orders issued by Local Boards which are so thoroughly and unarguably lawless that they can be reviewed in pre-induction civil proceedings, if not simply ignored with impunity. What disposition would be made, for example, of a suit to declare invalid induction orders issued to members of this Court in light of the express Congressional deferment granted by Sec. 6(f) of the Act, to say nothing of the other grounds for deferment or exemption to which all of the Justices are presumably entitled. Cf. *Schwartz* v. *Strauss*, 206 F. 2d 767 (2nd Cir. 1953) (Frank, *C.J.*, concurring). If anything, petitioner's Sec. 6(g) exemption might be said to be more emphatic than the deferment granted by Sec. 6(f). But compare *Kimball* v. *Selective Service Local Board No. 15*, 283 F. Supp. 606 (S. D. N. Y. 1968), extending the Solicitor General's concession in this case to student II-S deferments.

D. Congress, in Enacting Section 10(b)(3), Did Not Intend to Bar Suits Such as the Present One.

In enacting Sec. 10(b)(3), Congress did not intend to preclude a suit like the instant one. It is axiomatic that a statutory construction which avoids constitutional questions is to be preferred. More particularly, the intent to exclude the jurisdiction of the federal courts must plainly appear from the language and history of the enactment. No such explicit legislative intent appears here.

This is a statute uniquely in need of instructive judicial gloss. Its legislative history indicates that Congress was interested in "restating" the law as it existed in June 1967. See, House Report No. 267, Committee on Armed Services, at 7, 30-31; Cong. Record, Vol. 113 (June 12, 1967) S.8052.

In indicating that it was "codifying" preexisting law, Congress did not make clear what law it had in mind. To be sure, the case law prior to June, 1967, contained numerous decisions which required full exhaustion of administrative remedies and stated that only a criminal defense or a habeas corpus proceeding could be utilized as vehicles for challenging the validity of a draft board order. E.g., *Witmer* v. *United States,* 348 U. S. 375 (1955); *Watkins* v. *Rupert,* 224 F. 2d 47 (2d Cir. 1955); *Tamarkin* v. *Selective Service System,* 243 F. 2d 108 (5th Cir. 1957); *Woo* v. *United States,* 350 F. 2d 992 (9th Cir. 1965). However, there were also decisions which, because of the existence of special and compelling circumstances, either departed from the strict requirements of total administrative exhaustion or allowed the draft board's order to be challenged by way of injunctive suit prior to induction. E.g., *Townsend* v.

Zimmerman, 237 F. 2d 376 (6th Cir. 1956); *Glover* v. *United States*, 286 F. 2d 84 (8th Cir. 1961); *Wolff* v. *Local Board No. 12*, *supra*; *Ex Parte Fabiani*, 105 F. Supp. 139 (E. D. Pa. 1952); *Tomlinson* v. *Hershey*, 95 F. Supp. 72 (E. D. Pa. 1949); *United States* v. *Willard*, 211 F. Supp. 643 (N. D. Ohio 1962). Cf. *Schwartz* v. *Strauss*, 206 F. 2d 767 (2d Cir. 1953) (concurring opinion). Thus, Congress should be held to have meant to include all prior law, including cases like *Wolff* and others which recognized a broader scope of judicial review in this area.

An analogous situation was presented when Congress "codified" the law governing federal habeas corpus in 1948. 28 U. S. C. 2241 et seq. In giving content to these enactments this Court relied heavily on its own prior decisions. See, e.g., *Darr* v. *Burford*, 339 U. S. 200 (1950); *United States* v. *Hayman*, 342 U. S. 205 (1952); *Brown* v. *Allen*, 344 U. S. 443 (1953); *Irvin* v. *Dowd*, 366 U. S. 717 (1959). Whenever statutory language seemed at odds with prior developed case law, this Court found that Congress had not intended to depart from established procedures or diminish known rights. The lower federal courts have taken a similar approach with regard to the recent 1966 legislation on habeas. E.g., *White* v. *Swenson*, 261 F. Supp. 42 (W. D. Mo. 1966); *Plummer* v. *Louisiana*, 262 F. Supp. 1021 (D. C. La. 1967). Thus, there is sound authority for finding a legislative intent to restate *all* prior law.

Respondents will no doubt argue that the legislative history of Section 10(b)(3) reflects displeasure with *Wolff* and the intent to "overrule" it. But that history is more consistently interpreted to indicate criticism of the exhaustion and justiciability aspects of *Wolff* rather than an effort to repudiate its constitutional basis. See Note, 81

Harv. L. Rev. 685 (1967). In *Wolff* the plaintiffs had not completed the various appeals procedures available within the Selective Service System. Here, however, petitioner exhausted those remedies and his induction was imminent until stayed. It would be a juridically empty gesture to require the one final step before his claims can become judicially cognizable.

II.

The Declaration of Delinquency, Punitive Reclassification and Order to Report for Induction in This Case Are Invalid.

A. Petitioner's Reclassification Is Contrary to an Exemption Expressly Granted by Statute.

As a duly enrolled student in a recognized divinity school satisfactorily pursuing a full-time course of instruction, petitioner was automatically entitled to an exemption from military service under Sec. 6(g). The language of that section is unambiguous; the exemption is not conditioned on the making of a request, cf. Sec. 6(i)(2), or on the performance of any duty.

Nor did Congress grant the Selective Service System the power to condition that exemption. In defining the powers of the System, Congress, in Section 10(b) of the Act, stated that the President is authorized:

> "1) to prescribe the necessary rules and regulations to carry out the provisions of this title;"

In authorizing the President to promulgate the regulations under which local boards operate, Congress clearly

intended to authorize only those regulations which implemented the substantive provisions of the Act, including, of course, that providing for the automatic Sec. 6(g) exemption. And since the President was authorized to delegate to local boards only that "authority vested in him under this title," Sec. 10(c), Congress clearly did not intend that Selective Service should do that which was forbidden the President. Thus, as the government has conceded, "The board has in fact acted contrary to the terms of the statute. . . ." Memorandum for Respondents, p. 13.

One need hardly have to rely on the citation of authority to establish that administrative agency action which flies in the face of explicit statutory language is a nullity, but authority is of course available. E.g., *Estep* v. *United States, supra; Leedom* v. *Kyne, supra; Harmon* v. *Brucker, supra; McCulloch* v. *Sociedad Nacional, supra; Quaid* v. *United States,* 386 F.2d 25 (10th Cir. 1968). As this Court said in *Peters* v. *Hobby,* 349 U. S. 331, 345 (1955), "Agencies, whether created by statute or Executive Order, must of course be free to give reasonable scope to the terms conferring their authority. But they are not free to ignore plain limitations on that authority." See also *Greene* v. *McElroy,* 360 U. S. 474, 507-508 (1959).

B. Punitive Reclassification Is Not Authorized by Statute.

There is not a single word in the Act which so much as suggests that induction is to be used as a summary punishment for the breach of duties under Selective Service law. The word "delinquency" appears but once. In a provision added in 1967 to implement the "prime age group" idea, Congress defined such a group as "the age group from which selections for induction into the Armed Forces are

first to be made after delinquents and volunteers." Act §6(h)(1). This was in deference to the pre-existing Selective Service Regulation on order of induction. Reg. 1631.7. The amendment is perfectly consistent with a non-penal interpretation of "delinquency" status, which, it will be shown below, is the most reasonable interpretation to which the Regulations dealing with delinquency lend themselves. The legislative history of the amendment reflects no Congressional approval of the use of delinquency status and reclassification as a punitive procedure leading to the punishment of induction. Congress was concerned with the order of call, not with the totally different problems raised in this case.[25]

That induction is not authorized to be used as punishment for alleged offenses, was confirmed by the Executive Branch. In response to a letter concerning punitive reclassification from President Kingman Brewster of Yale University, Mr. Joseph A. Califano, Jr., Special Assistant to the President, wrote:

> "The President has asked me to thank you for your letter of December 21 in behalf of the Presidents of the Ivy Group of Colleges and Universities. We completely agree with the need to uphold fully the spirit as well as the letter of the constitutional assurances of due process. Any potential threat to these funda-

[25] In *United States* v. *Eisdorfer*, No. 67 Cr. 302 (E. D. N. Y. June 24, 1968), Dooling, *J.*, noted that:

> "The delinquency procedure has no statutory authorization and no Congressional support except what can be spelled out of the 1967 Amendment [to Sec. 6(h)(1)] . . . The delinquency regulations, moreover, disregard the structure of the Act; deferments and priorities-of-induction, adopted in the public interest, are treated as if they were forfeitable personal privileges." Opinion, p. 10.

mental values has no place in a democracy. As your letter states, the Selective Service System is not an instrument to repress and punish unpopular views. *Nor does it vest in draft boards the judicial role of determining the legality of individual conduct . . . . Where violations occur, the judicial system must be invoked.*" (Italics added.) N. Y. Times, December 31, 1967.

The Justice Department, likewise, does not interpret the Act to allow Local Boards to impose induction as a punishment. In response to an inquiry from Senator Hart to the Attorney General, the Department (through Assistant Attorney General Fred M. Vinson, Jr.) stated that only the punishments explicitly set forth in the Act may be imposed: "In short, where opinion is expressed, if there is no transgression of law, then no sanctions can be imposed. *If there is a transgression, then the sanctions which attach to it* are all that should be applied."[26] (Italics added.) The Department used the same language in a letter to Professor Herman Schwartz of the University of Buffalo Law School, noting that delinquency proceedings are not appropriate where there has been "a transgression," but only when an individual has failed to meet an affirmative obligation (citing failure to register, failure to report an address, and failure to report for induction). In these latter situations, the letter observed, delinquency proceedings give individuals an opportunity to avoid criminal liability by "bring[ing] themselves into compliance" with the Act.[27] It is precisely this distinction between delinquency proceedings to enforce compliance with duties

[26] Letter of January 6, 1966.

[27] Letter of January 6, 1966.

the registrant owes to his Local Board—which the Act and the Regulations may properly be read to authorize—and delinquency proceedings to impose the punishment of induction for alleged violation of law—which would violate the Constitution as well as the Act and Regulations—that petitioner relies upon here.

In concluding that the Act cannot be interpreted to authorize punitive reclassification and the penal use of induction, one should note the traditional principle that Acts of Congress be read in light of "our underlying concepts of procedural regularity and basic fair play." [28] Congress is presumed to be as concerned as the courts to protect basic rights of due process, and no statute should be construed to delegate authority to establish procedures "traditionally believed to be inadequate to protect affected persons." [29] Unless Congress "specifically has decided that the imposed procedures are necessary and warranted and has authorized their use," [30] there must be no imputation to Congress of the intention that there be any departure "from the traditional concepts of fair trial." [31] The Court has also emphasized that "Without explicit action by law makers, decisions of great constitutional import and effect would be relegated by default to administrators who . . . tice Frankfurter observed, "From a great mass of cases, running the full gamut of control over property and liberty,

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[28] *Gonzales* v. *United States*, 348 U. S. 407, 412 (1955).

[29] *Greene* v. *McElroy*, 360 U. S. 474, 504 (1959). Mr. Justice Frankfurter observed, in *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 168-169 (1951) (concurring opinion), that Congress, the Executive and administrative agencies have traditionally authorized and established procedures consonant with basic principles of fairness and due process.

[30] *Greene* v. *McElroy*, 360 U. S. at 507.

[31] *Estep* v. *United States*, 327 U. S. 114, 122 (1946).

there emerges the principle that statutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning." [33]

are not endowed with authority to decide them." [32] Mr. Jus-

C. Punitive Reclassification Is Not Authorized by the Regulations.

If the Regulations provided for reclassification and induction as a *punishment* for the breach of duties under selective service law, they would have to be held invalid, because, as we have shown, the Act does not delegate any such power. They would also be unconstitutional, for the reasons set forth below, Point III (D). But the Regulations do no such thing, and all that is required for the decision in this case is to hold that the act of Local Board 11 in declaring petitioner a delinquent and reclassifying him I-A for turning in his registration certificate is unauthorized by the Regulations, because if the delinquency procedure has any validity at all, its application must be confined to enforcing the registrant's duty to provide the information required by local boards to enable them intelligently to perform their classification function.

The question, therefore, is whether the possession requirement of Reg. 1617.1 is the kind of "duty" which, if not performed, can be the basis for delinquency and reclassification. We believe it is not.

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[32] *Greene* v. *McElroy*, 360 U. S. at 507. As Mr. Justice Holmes once observed in a similar context: "[I]t would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man." *Milwaukee Pub. Co.* v. *Burleson*, 255 U. S. 407, 437 (1921) (dissenting opinion).

[33] *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 165 (Frankfurter, J., concurring).

The principal responsibility of local boards is to select young men for induction into the armed forces. "Classification is the key to selection . . . ", Reg. 1622.1(b), and the key to classification is "pertinent" information. Reg. 1622.1 (c).

The Act and regulations empower the boards to secure this information in a variety of ways. Sec. 15(b) of the Act provides that "It shall be the duty of every registrant to keep his local board informed as to his current address and changes in status as required by such rules and regulations as may be prescribed by the President." Pursuant to Sec. 15(b), Reg. 1641.7(a) requires every registrant "to keep his local board currently informed of his occupational, marital, family, dependency, and military status, of his physical condition, of his home address, of his receipt of any professional degree in a medical, dental or allied specialist category." Changes in any of these conditions must be reported within ten days of their occurrence. Reg. 1641.7(b) requires every registrant to "submit to his local board in writing all information which the local board may at any time request from him concerning his occupational, marital, family, dependency, or military status or his physical condition or his receipt of a professional degree."

Reg. 1622.1(c) provides that "the mailing by the local board of a Classification Questionnaire (SSS Form 100) . . . shall be notice to the registrant that unless information is presented to the local board . . . which will justify his deferment or exemption from military service the registrant will be classified in Class I-A." Furthermore, "the local board shall proceed with the registrant's classification and classify him whenever (1) he fails to return his Classifica-

tion Questionnaire . . . , or (2) he fails to provide the local board with any other information concerning his status which he is requested or required to furnish." Reg. 1623.1 (b). In addition, "The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally reexamined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants." Reg. 1625.1(c). Finally, local boards are authorized to receive information from state and local welfare and governmental agencies. Reg. 1621.14.

Information being indispensable to classification, the local board must have some device by which to secure that information from uninformative registrants. That device is the delinquency procedure. Regs. Part 1642.

Delinquency, properly viewed, is analogous to civil contempt. It is a procedure designed not to punish for past acts, but to coerce compliance with the procedures of the system leading up to induction. Delinquency status says to the registrant that until you bring yourself into compliance with the rules designed to enable your local board to ensure that you are properly classified, you will be treated as having waived all the benefits of the System's procedures, and therefore as available for immediate induction.[34]

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[34] "It would appear that unless it can be shown that settled administration and published instructions having the effect of rules or regulations have essentially turned the delinquency regulations into standardized compliance-securing procedures that are compatible with the Act and the valid substantive regulations adopted under it, they cannot be regarded as a legally sufficient

If delinquency status and subsequent induction is treated like civil contempt, then the constitutional problems discussed in the next section are no longer relevant.[35] It is simply the sanction which the affected person brought upon himself, and which he had full power to avoid by bringing himself into compliance with the requirements of the procedures by which registrants are processed. He could have had himself removed from delinquency status at any time, Regs. 1642.4(c), 1642.10, as the contemnor could purge himself of contempt at any time, and the coercion visited upon him relates directly and specifically to his failure to abide by the rules of the proceedings in which the coercion is applied. The delinquent, like the contemnor, is not being coerced into compliance with some legal requirement foreign to the proceedings of the body imposing the coercive sanction. No one, of course, has ever suggested that civil contempt could be used to secure compliance with law generally. That would be *punishment*. The same is true in the case of delinquency.

The tenor of the delinquency regulations (Part 1642) is certainly to this effect. They explicitly provide for the expunging of delinquency—indeed, they relax the ordinary rule that a reopening of classification cannot be had after an order to report for induction, thereby allowing the registrant to conform to the requirements of Selective Service

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authorization for reclassification or priority-of-induction that would not otherwise be authorized by the Act and valid substantive regulations adopted under it. Cf. *Panama Refining Co.* v. *Ryan*, 1935, 293 U. S. 388, 420 *et seq.*; *Zemel* v. *Rusk*, 1965, 381 U. S. 1, 17-18." *United States* v. *Eisdorfer*, *supra* at 11.

[35] See *Shillitani* v. *United States*, 384 U. S. 364 (1966). The Solicitor General, in his Memorandum for the Respondents (p. 8) accepts this civil contempt analogy.

procedure right up to the last moment. The registrant is not bound by his waiver of the System's procedural rights until he is actually in the armed forces. Up until the very last moment, by cooperating with the procedures which enable his local board to make appropriate classification decisions, he can receive consideration of his claim that he should not be considered available for immediate induction. Regs. 1642.14(b). The "Delinquency Notice" itself requests the registrant to contact his local board at once, obviously for the purpose of clearing up the alleged default.[36]

Since delinquency is a "civil" means of enabling the board to perform its classification and selection functions, clearly it cannot be used against one who does not possess his registration certificate because that fact has nothing to do with these functions. The Board's consideration of the propriety of a registrant's current classification (or a classification he claims), or its ability to maintain official contact with him, is not impeded or affected by whether or not he happens to possess the required document, as long as the registrant otherwise provides his board with the pertinent information required by the statute and regulations.

It follows from the fact that the possession requirement is not an integral part of the relationship between a Local Board and its registrants, that to use reclassification as a sanction to enforce the requirement is to use it as punishment, not as "civil" enforcement of the rules of the classification procedure. This the regulations do not and could not provide. It is as foreign to their purpose as punitive reclassification for "interfering" with Selective

[36] Appendix, *infra*, p. 2a.

Service (a crime under Sec. 12 of the Act) was held to be in the *Wolff* case. There the Court of Appeals for the Second Circuit held that "no regulation authorizes a draft board to declare a registrant delinquent or to reclassify him" for an alleged act in violation of the Act or the regulations. "[J]urisdiction over offenses of this character is," the Court continued, "exclusively granted to the District Courts. . . ." 372 F. 2d at 821-22. Delinquency proceedings, on the contrary, are designed to give registrants an opportunity to "bring themselves into compliance with the rules of the classification procedure," as the Justice Department has observed. Acts unrelated to the classification process itself may be crimes under the Act. As such, they may be punishable—after a fair trial, before an impartial judicial tribunal, with all of the required procedural safeguards and rights. They may not, under the regulations, the Act, or the Constitution, be punished in summary proceedings appropriate only for "civil" enforcement of the rules of the classification process.

D. Punitive Reclassification Is Unconstitutional.

The purpose of reclassifying a registrant who has not cured his delinquency is to make him available for immediate induction. Reg. 1642.13. Selective Service is quite candid about this, observing that "Since the purpose of the law is to provide men for the military establishment rather than for the penitentiaries" induction is preferable to prosecution for "minor infractions of rules during [a registrant's] selective service processing."[37] Reclassification of

[37] Selective Service System, Legal Aspects of Selective Service (1963), p. 42. Both the Selective Service System and the Department of Justice, during World War II, had candidly referred to the reclassification of delinquents as an "administrative pen-

delinquents, therefore, is directed toward the sanction of an induction order. Consideration of the validity of such reclassification for violation of a requirement of the Act or Regulations cannot be separated from questions concerning the permissibility of using induction as a punishment, and the procedures required in order to do so. When the "delinquency" is based upon an alleged act in violation of law, as in this case, the use of induction as a punishment raises substantial questions about the constitutionality of the application of such a sanction. Though we argued above that the constitutional issues need not be met, because neither the Regulations nor the Act authorize the punitive use of induction, we examine here the constitutional problems that have to be faced if this is not the case.

In considering the validity of punitive reclassification, it is important to keep in mind that General Hershey has been quite candid about his purposes in directing the reclassification of persons alleged not to possess their draft cards, or who otherwise allegedly violate the Act or Regulations. He regards reclassification for "delinquency" as a legitimate punishment which the Selective Service System may impose when it determines that a registrant has engaged in "illegal activity." Letter to Local Boards, October 26, 1967 (Appendix, *infra*, p. 1a). His letter encouraged Local Boards, "if evidence of violation of the act and regulations is established," to declare the registrant a delinquent and "process him accordingly." *Ibid.* He repeated this position frequently during the ensuing con-

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alty." Enforcement of the Selective Service Law, Selective Service System Special Monograph No. 14, 56 (1951) [hereinafter Enforcement Monograph]; Supp. No. 18, Justice Department Circular No. 3421 to United States Attorneys, dated October 18, 1943 [contained in Enforcement Monograph F-67].

troversy over his "usurpation of power" in requesting draft boards to "become extra legal judges of the legality of acts of protest"—in the language of his critics. He explained that he was not attempting to "suppress lawful dissent" but only "to stop illegal activity" (New York Times, Dec. 12, 1967, p. 16, col. 1). At no point did he deny or even qualify the apparent conclusion that he contemplated use of the threat of reclassification and induction to deter what he had concluded were unlawful activities, and the actual imposition of those sanctions to punish those who, in the opinion of their Local Board, are "guilty."

The central issue is whether an induction order following upon a punitive reclassification would be penal in the constitutional sense. On this question there can hardly be doubt. The leading case on the definition of "punishment" is *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144 (1963). The Court there held unconstitutional a statute divesting of their citizenship those who leave or remain outside the United States in time of war or national emergency to avoid service in the armed forces. The statute afforded certain administrative procedures to determine the relevant facts, with judicial review, but the entire Court was agreed that if deprivation of citizenship was a "punishment" these procedures were insufficient under the Fifth and Sixth Amendments. The majority held that expatriation was in fact punishment. It was able to do so based upon extensive legislative history of the statute—which recourse is of course not available here, since only Regulations are involved. But the Court set forth the relevant criteria to be used in the absence of legislative history.

"The punitive nature of the sanction here is evident under the tests traditionally applied to determine

whether an Act of Congress is penal or regulatory in character, even though in other cases this problem has been extremely difficult and elusive of solution. Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face." 372 U. S. at 168-169.

Of the *Mendoza-Martinez* criteria, at least four clearly apply here.

(1) Induction "involves an affirmative disability or restraint." This could hardly be gainsaid in light of the well-recognized facts of military life; indeed, the availability of habeas corpus to secure release from the armed forces, *Eagle* v. *United States ex rel. Samuels*, 329 U. S. 304 (1946), necessarily rests upon this basis.

(2) Induction premised upon 'delinquency' "comes into play only on a finding of *scienter*." The Act makes it an offense to "knowingly" fail or neglect to perform a required duty. Sec. 12(a). The Supreme Court has imposed the same criminal *mens rea* requirement upon liability for

delinquency status, reclassification, and consequent induction. *Bartchy* v. *United States,* 319 U. S. 484 (1943).

(3) Punitive reclassification followed by induction is designed to "promote the traditional aims of punishment—retribution and deterrence." SSS Form 304 resolves any doubt on this score, for it informs the delinquent registrant that unless he brings himself into conformity with his duties under the Act and Regulations, he will be liable to reclassification to Class I-A or to prosecution. One is at a loss to imagine any functions other than deterrence and retribution which might be served by taking a registrant out of a classification in which he otherwise belongs—like IV-D (ministerial), IV-F (unfit for service), II-S (student), or III-A (dependency)—and reclassifying him for immediate induction into the armed forces.

(4) "[T]he behavior to which [punitive reclassification and induction] applies is already a crime," under Sec. 12 of the Act. *United States* v. *Kime,* 188 F. 2d 677 (7th Cir. 1951), cert. denied 342 U. S. 825 (1951); *United States* v. *Hertlein,* 143 F. Supp. 742 (E. D. Wisc. 1956).

In summary, then, induction as a sanction imposed after punitive reclassification for an alleged violation of a Selective Service duty meets the test for "punishment" set forth in *Mendoza-Martinez.*[38] It is therefore essential to consider the process of punitive reclassification to determine whether it meets the minimum constitutional standards for a procedure leading to the imposition of "punishment."[39]

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[38] See also *United States* v. *Brown,* 381 U. S. 437 (1965) for a more recent application of the test for "punishment."

[39] It should be noted that while some members of the Court in *Mendoza-Martinez* disagreed with the holding that the sanction

The essential constitutional requirements for the imposition of punishment are:

(1) *Counsel.* In Selective Service proceedings, including punitive reclassifications by which it is sought to impose induction as a punishment, there is no right to the assistance of any counsel, let alone to appointed counsel. Cf. *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *In Re Gault,* 387 U. S. 1, 34-42 (1967). Reg. 1624.1(b) states: "[N]o registrant may be represented before the local board by anyone acting as attorney or legal counsel." The courts have upheld the denial of counsel in Selective Service proceedings on the ground that they "are non-judicial in nature and clearly non-criminal." *United States* v. *Sturgis,* 342 F. 2d 328, 332 (3rd Cir.), cert. denied, 382 U. S. 879 (1965); *United States* v. *Capson,* 347 F. 2d 959 (10th Cir.), cert. denied, 382 U. S. 911 (1965). This may well be a proper analysis for the ordinary classification process, but the court's emphasis on the non-judicial, non-criminal nature of the proceedings shows how inappropriate the classification process is for determining questions of punishable guilt.[40]

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there was "punishment" (on the ground that its purpose was not to deter or to impose retribution on the individuals, but rather to "regulate" the armed forces—by maintaining their morale in the face of wartime draft evaders), the Court was unanimously of the view that "punishment" in the institutional sense can only be imposed after a trial.

[40] As if to emphasize that the Government Appeal Agents provided for in the Regulations (Reg. 1604.71) have little in common with the kind of counsel the Constitution requires, General Hershey last year requested all Agents "to make known to the local board any knowledge of . . . violations by a registrant." Letter to all Government Appeal Agents, Nov. 2, 1967. N. Y. Times, November 17, 1967.

(2) *Confrontation and Cross-Examination.* The Sixth Amendment also guarantees to the accused "the right . . . to be confronted with the witnesses against him . . .," which includes the right of cross-examination. *Pointer* v. *Texas,* 380 U. S. 400 (1965); *Douglas* v. *Alabama,* 380 U. S. 415 (1965). No such rights are provided for in the Regulations, and Part 1624 ("Appearance before Local Board") plainly does not contemplate a hearing in which a registrant accused of a violation can confront and cross-examine his accusers. See *Harris* v. *Ross,* 146 F. 2d 355 (5th Cir., 1944).

(3) *Compulsory Process.* Not only is this right not affirmatively enforced in Selective Service proceedings, but the Regulations explicitly provide that it is wholly within the discretion of a Local Board to decide whether to "*permit* any person to appear before it with or on behalf of a registrant. . . ." (Reg. 1624.1(b)). (Italics added.) It has been estimated that forty percent of all Local Boards allow no witnesses at all, and half of those which sometimes admit witnesses do so only separately from the registrant.[41] It has been held that a registrant has no constitutional or statutory right to have witnesses before his Local Board. See, e.g., *Uffleman* v. *United States,* 230 F. 2d 297 (9th Cir., 1956); *Harris* v. *Ross,* 146 F. 2d 355 (5th Cir., 1944).[42]

(4) *Self-Incrimination.* In the ordinary classification process the burden is on the registrant to establish his eligibility for a deferment or exemption. Regs. 1622.1(c); 1622.10; 1623.2. A registrant is bound to provide all re-

[41] Note, 114 U. Pa. L. Rev. 1014, 1033, n. 114 (1966).

[42] Reg. 1621.15 gives Local Boards the power to subpoena witnesses, but it seems clear that a registrant has no right to the exercise of this right in his behalf.

quired information, to notify his Board of any change in his circumstances, and to answer such further questions as his Board may ask. Reg. 1625.1; Act §15(b). As the Selective Service itself observes: "The burden now is, therefore, definitely upon the registrant to show that he should not be deemed available for immediate military service." Selective Service System, Legal Aspects of Selective Service (1963), p. 7. The situation is no different in delinquency proceedings looking toward the punitive imposition of induction. After a registrant receives SSS Form 304, the "Notice of Delinquency," it is entirely up to him to exonerate himself if he can. Unless he persuades the Local Board that he was not "guilty," he will quickly be inducted. See Regs. 1642.4, 1642.12, 1642.13, 1642.14. Cf. *Spevack* v. *Klein,* 385 U. S. 511 (1967).

(5) *Burden of Proof.* Closely connected with the accused's right to insist that the State prove its case against him is his right to demand that such proof be "beyond a reasonable doubt." See *Davis* v. *United States,* 160 U. S. 469, 486-488 (1895); *Holland* v. *United States,* 348 U. S. 121, 139-140 (1954). Obviously, since Selective Service procedure puts the burden of proving his innocence upon the accused registrant, this requirement is not met in delinquency proceedings.

(6) *An Impartial Tribunal.* The Sixth Amendment requires an "impartial jury," and an accused is also entitled to an impartial judge. *Tumey* v. *Ohio,* 273 U. S. 510 (1927). With one minor exception,[43] no change of venue or disqualification for bias (or even opportunity for recusal) is available under Selective Service procedure. Yet

[43] Reg. 1604.55. Cf. Reg. 1604.62.

the Marshall Commission documented the extraordinary prejudice against conscientious objectors which exists in at least one state.[44] Some inexcusable examples of prejudice occur in the cases. See, e.g., *Niznik* v. *United States*, 173 F. 2d 328 (6th Cir.), cert. denied, 337 U. S. 925 (1949). Surely a system which is to be used for the imposition of punishment must afford some way in which an accused can, in proper circumstances, secure an impartial tribunal.[45]

(7) *Public Trial.* The Sixth Amendment guarantees a "public trial." As the Supreme Court observed in *In re Oliver*, 333 U. S. 257 (1948), the friends, relatives and counsel of the accused have universally been held entitled to be present. Selective Service procedures, as noted above, do not contemplate anything but secret proceedings.

(8) *Jury Trial.* The Fifth Amendment guarantees this right in proceedings leading to serious punishments. See *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966). No such right is afforded in the Selective Service System.

Such, in sum, are some of the major constitutional rights which an accused faced with "punishment" must be afforded, *Kennedy* v. *Mendoza-Martinez, supra,* and which

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[44] "In Pursuit of Equity: Who Serves When Not All Serve?", Report of the National Advisory Commission on Selective Service (1967), p. 29. The Report also states that fewer than 3.3% of all Local Board members are Negro, Puerto Rican, Spanish American, Oriental or American Indian, *Id.*, p. 19.

[45] The Selective Service procedures—including those relating to delinquents—contain innumerable instances in which important decisions are left to the discretion of System personnel. See, e.g., Regs. 1642.4(c) (Local Board "may" remove registrant from delinquency status), 1642.12 (Local Board "may" classify delinquent registrant I-A). Such a thoroughly discretionary administrative system is certainly an inappropriate agency for the imposition of punishment, and particularly here where First Amendment values are involved.

have no counterpart in Selective Service delinquency and punitive reclassification proceedings. It is difficult to conceive of a proposition of constitutional law clearer than the conclusion to which this analysis inevitably leads: induction as a punishment cannot be imposed for alleged delinquency following procedures of the sort described. For as the Court observed in *Mendoza-Martinez,* "If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no farther." 372 U. S. at 167.[46]

E. Local Board No. 11 Did Not Follow the Procedure for Punitive Reclassification Required by the Regulations and by Due Process.

An administrative agency is bound to act according to its own procedural rules when its action affects a substantial interest of an individual.[47] This is true even if, absent the agency's rule, the individual would have had no due process right to the prescribed procedure.[48] As the Supreme Court held in *Estep* v. *United States, supra,* actions of a

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[46] The need for impartial, responsible enforcement is critically important when the alleged offense consists of activity claimed to be protected under the First Amendment. A prosecution in such circumstances, if it were wholly motivated by disapproval of the *content* of the political idea sought to be expressed, would certainly be invalid. But absent the open, responsible, careful procedure of a criminal trial, such impermissible criteria for enforcement are necessarily of such "low visibility" that constitutional supervision is virtually impossible. See *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, 900-901 (1961) (Mr. Justice Brennan, with the Chief Justice and Justices Black and Douglas, dissenting).

[47] Jaffe, Judicial Control of Administrative Action 587 (1956).

[48] *United States ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260 (1954); *Service* v. *Dulles,* 354 U. S. 363 (1957); *Vitarelli* v. *Seaton,* 359 U. S. 535 (1959).

local board in derogation of the Act or valid regulations made under it are "lawless and beyond its jurisdiction."[49] Scrupulous adherence by local boards to the procedural requirements of the regulations is also demanded by the congressional admonition in Sec. 1(c) of the Act that the system be "fair and just," and is particularly important given the typically very limited judicial review of local board factual determinations.[50] Recognizing the need for strict procedural regularity to ensure the fairness of [illegible]ly unreviewable fact finding, courts have frequently granted judgments of acquittal, or reversed convictions, because of a procedural default in the classification process.[51] Failure of a local board to afford a registrant the procedure required by the regulations has been held to entitle the registrant, in appropriate circumstances, to an injunction against further proceedings looking toward induction until the procedural default has been rectified.[52]

Timely and adequate notice is one of the cardinal principles of procedural fairness and it has often been judicially enforced in Selective Service cases by demanding adher-

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[49] 327 U. S. at 121.

[50] See Note, *Fairness and Due Process Under the Selective Service System*, 114 U. Pa. L. Rev. 1014, 1023 (1966).

[51] "[I]t is the uniform view of the courts passing on the subject that failure to accord a registrant the procedural rights provided by the regulations invalidates the action of the local board." *Knox* v. *United States*, 200 F. 2d 398, 401 (9th Cir. 1952). See also *Gonzales* v. *United States*, 348 U. S. 407 (1955); *Simmons* v. *United States*, 348 U. S. 397 (1955); *Olvera* v. *United States*, 223 F. 2d 880 (5th Cir. 1955); *United States* v. *Vincelli*, 215 F. 2d 210, *reh. denied*, 216 F. 2d 681 (2nd Cir. 1954); *United States* v. *Burlich*, 257 F. Supp. 906 (S. D. N. Y. 1966).

[52] *Townsend* v. *Zimmerman*, 237 F. 2d 376 (9th Cir. 1956) (per Stewart, C.J., now Mr. Justice Stewart).

ence to a regulation requiring notice, or by invoking due process directly.[53] In the case of alleged "delinquents," the regulations are explicit on the subject of notice. Reg. 1642.4(a) provides that a Local Board "may declare [a registrant] to be a delinquent" if he has failed to perform a duty required of him. Reg. 1642.4(b) provides that "When the local board declares a registrant to be a delinquent, it . . . shall complete a Delinquency Notice (SSS Form 304) . . . setting forth the duty or duties which the registrant has failed to perform." The local board shall mail the original "to the registrant." Finally, Reg. 1642.10 provides that "No delinquent registrant shall be placed in Class I-A, Class I-A-O, or Class I-O . . . unless the local board has declared him to be a delinquent in accordance with the provisions of Section 1642.4 and thereafter has not removed him from such delinquency status." The orderly procedure contemplated by these regulations (and the rest of Part 1642) could hardly be clearer: (1) information comes to the attention of the local board indicating that a registrant is delinquent; (2) the local board declares that that is the effect of the information and notifies the registrant; (3) the registrant is afforded a reasonable time to clear up the matter (see Reg. 1642.4(c)); (4) only if, after a reasonable time, the board "has not removed him from such delinquency status" may it proceed to reclassify him based upon his delinquency status (Reg. 1642.10). This is a clear and simple procedure, and in it SSS Form 304 performs the indispensable function of notice. SSS Form 304 is itself perfectly explicit as to its purpose. It tells the registrant why he has been placed in delinquency status, it directs him to communicate at once with his local board

[53] See, e.g., *United States* v. *Vincelli, supra; United States* v. *Stiles*, 169 F. 2d 455 (3rd Cir. 1948); *United States* v. *Thompson*, D. C. Mass., 1 S. S. L. R. 3059 (1968).

or to seek advice from the local board nearest him, and it notifies him that his alleged breach of duty is both a crime and that, if not cleared up, it may result in a I-A classification.

The by now familiar local board practice of sending both a delinquency notice and a notice of reclassification on the same day is, therefore, forbidden by the regulations. Such a procedure deprives the delinquency notice of any function whatsoever. How can a registrant who receives both notices the same day clear up the matter with his local board, as SSS Form 304 requires him to do lest he be reclassified I-A? How can he remove the delinquency after reasonable notice, as Regs. 1642.4(c) and 1642.10 contemplate?

The purpose of the procedure set out in the regulations is apparent. Many seeming delinquencies may when brought to the attention of the registrant be quickly cured, or turn out not to exist. The regulations would be unreasonable, and perhaps even void, if a declaration of delinquency could be coupled with a simultaneous reclassification to I-A with the consequent immediate exposure to an induction order which the regulations provide.[54] The Supreme Court has recently reemphasized the constitutional requirement of notice *in advance of proceedings*, holding that notice at an initial hearing, with opportunity for a postponement, is constitutionally insufficient.[55] The mere availability

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[54] Reg. 1642.13. That SSS Form 304 must be sent a reasonable time prior to action by the local board predicated on the delinquency status is exemplified by the case of the registrant who is already I-A. Obviously, he cannot be ordered inducted before he has had a reasonable chance to respond to the Notice of Delinquency.

[55] *In re Gault*, 387 U. S. 1, 32-33 (1967). See also *United States* v. *Thomson*, 1 S. S. L. R. 3059 (D. Mass. 1967).

of a hearing *after* reclassification is no substitute for timely notice. No lawyer will believe that the opportunity to have a I-A removed is the same as the right to show, in advance, that there is no occasion to reclassify to I-A.

Also to be disposed of is any idea that failure to give timely and proper notice may be a trivial default which could not cause prejudice. This is not a mere formal default, properly treated as *de minimis*. The critical procedural right to proper, timely notice is denied. As this Court said of a similar procedural error, "This is not an incidental infringement of technical rights. Petitioner has been deprived of . . . a fundamental safeguard, and he need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to complain of the deprivation." *Simmons* v. *United States*, 348 U. S. 397, 406-407 (1955).

III.

Petitioner's act of returning his registration certificate to Local Board No. 11 was conduct protected by the First Amendment.

A. Peaceful Conduct Which Is Relevant to the Issue Giving Rise to the Protest Is Speech Protected by the First Amendment.

Petitioner agrees with this Court's statement in *United States* v. *O'Brien*, 88 S. Ct. 1673 (1968), that it is untenable to assert that any conduct whatsoever, intended to express an idea, can be labelled speech. 88 S. Ct. at 1678. However, we believe that, at the very least, symbolic conduct must be considered speech if it is peaceful and if it is relevant to the issue giving rise to the symbolic protest. For example,

a peaceful march in support of better job opportunities for Negroes should be considered speech because the march *is* peaceful and because that form of demonstration is a relevant and traditional method of voicing protest over civil rights and economic issues. On the other hand, the surrender of drivers' licenses to protest the war need not be considered speech, since the duty to carry a driver's license has no relationship to war. Thus, in this case, the surrender of petitioner's Registration Certificate to protest the war should be held to be protected speech. Not only is its surrender a peaceful act, but since it is also a part of the government's system for fighting a war, the surrender is a particularly relevant form of protest.

The rule we propose—that symbolic conduct should be considered speech if it is both peaceful and relevant to the issue giving rise to the protest—permits courts to draw a sensible balance between the need for an ordered society and the need to serve the vital functions of the First Amendment. The need for an ordered society is served because people will not be free to engage in any conduct which they choose to describe as symbolic speech even though it expresses an idea; they can engage only in conduct relevant to the issue which led to the protest. The vital functions of the First Amendment will be served because those functions are implemented by peaceful relevant conduct.

One critical function of the First Amendment is to insure that there is a free marketplace of ideas. *Abrams* v. *United States,* 250 U. S. 616, 630 (1919). The First Amendment reflects the view that no government, no writer, no scientist, no critic, has a monopoly of the truth, and that the truth is best approached by encouraging all people to contribute

to the political dialogue. This function is implemented by treating peaceful relevant conduct as speech, particularly in view of the realities surrounding access to the instruments of mass communication.

It is a hard fact of today's world that the communications media are the key to whether or not the marketplace of ideas can function effectively under modern conditions. See Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641, 1641-1656 (1967).[56] The ideas of scores of millions are shaped by television, movies, national magazines, and newspaper monopolies. When private citizens are unable to secure access to these media, as is normally the case, they are deprived of the opportunity to contribute effectively to the process by which public opinion is formed. This renders the marketplace theory of speech more myth than reality, and the imbalance is exacerbated when, as is too often the case, the national media do not undertake themselves to circulate the ideas and grievances of the citizens who are frozen out of the free speech marketplace.[57] However, it is also a hard fact of today's world that the national media customarily treat peaceful symbolic conduct such as demonstrations, marches, surrender of draft cards, and other *dramatic* and *graphic* conduct, as news.[58] Thus, those who normally are unable

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[56] For discussion of the crucial role of the mass media in shaping public opinion and of the disabilities faced by those who lack access to the media, see also, Velvel, *Freedom of Speech and The Draft Card Burning Cases*, 16 Kan. L. Rev. 149, 152-153 (1968); Kamin, *Residential Picketing and the First Amendment*, 61 Northwestern U. L. Rev. 177, 214 (1966); Finman & Macaulay, *Freedom to Dissent: The Viet Nam Protests and the Words of Public Officials*, 1966 Wis. L. Rev. 632, 684.

[57] See Barron, *op. cit.*

[58] See authorities cited in note 56, *supra*.

to secure access to the media are enabled to contribute effectively to the process by which opinion is formed by attracting the attention of the media. Consequently, such conduct must be considered speech if the free speech clause is to have effective meaning under modern conditions for the scores of millions of citizens who lack access to the media.

Another critical function of the First Amendment is to aid in giving meaning to one of the fundamental tenets of our democracy: that the people have the power to insure that the government will be responsive to their wishes.[59] This First Amendment function is also served by considering peaceful symbolic conduct to be speech. Since such conduct receives widespread publicity, government officers are confronted with the diverse ideas and grievances which are held by citizens. They are thus enabled to respond to citizens' wishes and, indeed, may find that to be reelected they must respond even though they might prefer not to. Furthermore, other citizens who have not participated in the peaceful relevant conduct, will be exposed to these diverse ideas and grievances, and their consequent thought and actions will also influence the government.

Finally, the safety valve function of speech is served when peaceful relevant conduct is considered to be speech.

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[59] In *Stromberg* v. *California*, 283 U. S. 359, 369 (1931), the Court called attention to this function of the First Amendment:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

The Court reemphasized the responsiveness function of the First Amendment when it quoted the foregoing *Stromberg* statement in the relatively recent case of *Edwards* v. *South Carolina*, 372 U. S. 229, 238 (1963).

Mr. Justice Brandeis emphasized that a central function of speech is to preserve a stable and just society by enabling citizens to express their grievances in a peaceable way.[60] Engaging in peaceful relevant conduct permits citizens, who hold deep-seated grievances or ideas, to express their tensions and emotions peaceably and constructively rather than violently and destructively. Common experience teaches us that Mr. Justice Brandeis was correct when he said "repression breeds hate; that hate menaces stable government." People are more likely to work within an existing institutional system when they feel they have an opportunity to express themselves effectively within that system.

The specific act of surrendering a draft card in protest over the war meets the test suggested here for determining when conduct should be considered speech, and it is also clear that it fulfills the vital First Amendment functions stated above. It meets the proposed test for determining when conduct should be considered speech because it is peaceful and because it is a relevant method for protesting a war. The surrender of a card also fulfills the marketplace function of the First Amendment, the function of helping to insure that the government is responsive to the people's wishes, and the safety-valve function as well.

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[60] "Those who won our independence . . . knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form." *Whitney* v. *California*, 274 U. S. 357, 375-376 (1927) (concurring opinion).

B. Under the Tests for Determining When Speech May Be Abridged, the Surrender of Draft Cards Cannot Be Penalized.

1. Reg. 1642.4(a) Upon Which Petitioner's Delinquency, Reclassification, and Induction Order Are Based Is Vague and Overbroad.

Reg. 1642.4(a) authorizes declarations of delinquency (and consequent I-A classification and priority induction) of a registrant who "has failed to perform any duty or duties required of him under the selective service law. . . ." As construed by the government in this and other cases, the regulation can be and has been applied to punish a registrant for exercising First Amendment rights.

An examination of the regulations demonstrates that the delinquency provisions are designed to serve the discrete purpose of securing information needed for intelligent classification (see Sec. II C, *supra*). Consequently, the "duties required" under Reg. 1642.4(a) are properly limited to such things, for example, as the duty to return the Classification Questionnaire within 10 days (Reg. 1621.10), the duty to correct an inadequate Questionnaire (Reg. 1621.13), and the duty to report for physical examination (Reg. 1628.16). But as we have seen, the regulation has in fact been construed to include not only the alleged "duty" by petitioner to possess his registration certificate, but also the kind of "duty" said to have been owed by the appellants in *Wolff* v. *Selective Service, supra.* According to General Hershey, it could, and should, be construed also to include the "duty" not to violate the Act in its entirety, as well as its "related processes", and not to perform acts "under unfortunate influences of misdirected emotions . . . or even completely vicious efforts to cripple,

if not to destroy, the unity vital to the existence of a nation. . . ." App., *infra*, p. 1a.

A statute or regulation which lends itself to such broad interpretation runs afoul not only of the general rule against vague statutes, see, e.g., *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961); Amsterdam, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. Law Rev. 67 (1960), but also the rule in *Dombrowski* v. *Pfister*, *supra*, which condemns statutes with an "over-broad sweep . . . [which] lend themselves too readily to denial of [First Amendment] rights." 380 U. S. at 486.

We need not rely only on the infinite scope of the delinquency regulation as defined by General Hershey, for local draft boards have acted upon his interpretation of the regulation. In addition to the hundreds of registrants, like petitioner, who have been declared delinquent, reclassified, or ordered to report for induction for turning in their draft cards, other registrants have been subjected to the same sanctions for more bizarre reasons, though reasons which nonetheless satisfy General Hershey's expansive view of the regulation. Thus, in addition to the reclassification of appellants in *Wolff* v. *Selective Service*, *supra*, for participating in an anti-war demonstration at a Michigan draft board, sanctions have been imposed on other registrants for participating in a peaceful, public demonstration near an Armed Forces Entrance and Examination Station, for distributing anti-war leaflets during pre-induction physical examinations, and for "counseling evasion of the Selective Service Law." Footnote 8, *supra*. And a student at the University of Oklahoma, John Ratliff, was reclassified I-A by Local Board No. 76, Tulsa, Oklahoma, because "The local board did not feel that your activity as a member of

SDS is to the best interest of the U. S. Government." Letter from Local Board No. 76 to John Ratliff, dated November 13, 1967.

In *Aptheker* v. *Secretary of State,* 378 U. S. 500, 508 (1964), this Court said, "It is a familiar and basic principle . . . that 'a governmental purpose to control or prevent activities constitutionally subject to . . . regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'" And the Court reiterated the admonition set out in *NAACP* v. *Button,* 371 U. S. 415 (1963): "[First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions," 378 U. S. at 516.

The examples we have given of the way in which Reg. 1642.4(a) has been applied, bring it squarely within the doctrine which forbids overbroad legislation which invades rights protected by the First Amendment. Those cases having led to delinquency, reclassification, and induction orders, and the National Director of Selective Service having actively and publicly encouraged local boards to impose the same sanctions on "misguided registrants", surely the regulation has had the effect of "discouraging protected activities," *Dombrowski* v. *Pfister, supra* at 490, and "chilling . . . protected expression". *Id.* at 494. Reg. 1642.4(a) should be struck down in its entirety because to deal with "only a narrow portion of the prohibition at any one time" will not contribute "materially to articulation of the statutory standard." *Id.* at 491.

The Court's holding in *Cox* v. *Louisiana,* 379 U. S. 536, 537 (1965), applies equally here:

> "[T]he lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor."

The fact that petitioner has been penalized under an overbroad edict which vests too much power in administrators distinguishes this case from *United States* v. *O'Brien, supra.* In the *O'Brien* case, Congress had passed a statute which made it unlawful to "knowingly destroy" or "knowingly mutilate" a draft card. As the Court stressed, the statute was a narrow and precise way of regulating conduct which included elements of speech. Because it was narrow and precise, the statute did not threaten to discourage constitutionally protected activity, such as peaceful marches and dissenting speeches, and it did not give administrators the power to discourage or threaten citizens who engaged in constitutionally protected activity.

2. *Plaintiff Is Being Unlawfully Punished Under Past and Present Interpretations of the Balancing Test.*

Prior to the *O'Brien* decision, this Court had repeatedly made clear, in cases involving the question whether certain courses of conduct were constitutionally protected, that government could not penalize First Amendment conduct unless it showed a *substantial* danger to compelling governmental interests.[61] In *O'Brien,* however, the Court

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[61] That the government must show a substantial danger to compelling state interests before it can penalize First Amendment conduct was made clear in cases involving legal programs run by the NAACP and by unions, and in cases involving civil rights demonstrations. For example, in the cases involving legal programs, the

appeared to indicate that, although First Amendment conduct cannot be regulated unless it poses *some* danger to a compelling governmental interest, the degree of danger need not be *substantial* in order for the government to have the right to regulate the conduct. The Court said that a regulation is "justified if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction is no greater than is necessary to the furtherance of that interest."[62] The *O'Brien* formulation seems to mean that there need not be a *substantial* danger to a compelling interest. Thus, were Congress to pass a narrow and precise law banning

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states claimed an interest in preventing barratry, maintenance and champerty, and in preventing lay intermediaries from controlling litigation for their own benefit rather than the client's. The Court balanced the danger to state interests against the First Amendment conduct at issue, and found the danger too insubstantial to permit the state to penalize the conduct. "We held [in *NAACP* v. *Button*] the danger of baseless litigation and conflicting interests between the association and individual litigants far too speculative to justify the broad remedy invoked by the State, a remedy that would have seriously crippled the efforts of the NAACP to vindicate the rights of its members in court. . . . Nor can the case at bar be distinguished from the *Trainmen* case in any persuasive way . . . In both cases, there was absolutely no indication that the theoretically imaginable divergence between the interests of union and member ever actually arose in the context of a particular lawsuit; indeed in the present case the Illinois Supreme Court itself described the possibility of conflicting interests as, at most, 'conceivable.'" *United Mine Workers of America* v. *Illinois State Bar Association*, 389 U. S. 217 (1967). The civil rights demonstration cases involved state interests in preventing public disorders. The Court weighed the threat to public order, and found it too insubstantial to permit the states to infringe the First Amendment conduct at issue. *Edwards* v. *South Carolina*, 372 U. S. 229, 235-236 (1963); *Cox* v. *Louisiana*, 379 U. S. 536, 544-551 (1965); *Brown* v. *Louisiana*, 383 U. S. 131, 139-140, 141 (1966).

[62] 88 S. Ct. at 1679.

peaceful marches outside of draft boards because these protests dissuade a few citizens from volunteering for the service, the statute could be upheld under *O'Brien,* for this congressional regulation of speech would be undertaken under the constitutional power to raise armies; its object would be to further the government's interest in promoting voluntary enlistments; the interest in promoting enlistments is not related to suppressing free speech; and the infringement on free speech would be no greater than necessary to further the interest in promoting voluntary enlistment.

But because peaceful relevant symbolic conduct plays a vital role in serving the First Amendment function of supplying the market-place with ideas, keeping government responsive to the people and providing a safety valve, the government ought not to be empowered to penalize First Amendment conduct unless that conduct poses a *substantial* danger to compelling government interests. For as the pre-*O'Brien* balancing cases demonstrate, the government can always show that First Amendment conduct poses some slight danger to compelling state interests—indeed pure speech often poses some danger to state interests—and therefore, if *O'Brien* means that conduct can be punished in the absence of a *substantial* danger, it opens the door to government repression of many kinds of speech—pure and symbolic.

We contend and will later show that petitioner's reclassification and induction notice are unlawful if, pursuant to the pre-*O'Brien* balancing cases, the government must demonstrate a substantial danger before it can penalize citizens. However, we also contend that petitioner's reclassification and induction are unlawful under the apparently more lax standards of the *O'Brien* case. For in

reclassifying and inducting men who surrender their draft cards in protest over the war, the government is restricting speech to a much greater degree than is essential to further its interest in having an efficient Selective Service System, and therefore violating the *O'Brien* requirement that a restriction on speech can be no greater than is essential to further a valid government interest.

The restriction on speech at issue in this case is greater than necessary because the government could run an effective selective service system even if no-one carried a draft card—a point virtually conceded in the government's *O'Brien* brief in the First Circuit (pp. 13-14). If the government could run an effective selective service system even though no-one carried a draft card, it can obviously run an effective system when draft cards are surrendered by a small percentage of the millions of men who are required to carry them. The restriction on speech is also greater than necessary because General Hershey's punitive edict, and the implementing delinquency regulations, not only strike at the surrender of cards, but chill many forms of expression whose constitutional legitimacy is not open to dispute and which in no way harm the draft. Finally, the restriction on speech is greater than necessary because, even if it were necessary to penalize those who surrender their cards in order to protest the draft (which it in fact is not), it is possible for the Congress to formulate a narrower and more precise regulation of speech than the Hershey edict and the delinquency regulations.

There is a further reason why the government has violated the standards set forth in *O'Brien* by reclassifying and inducting men who surrendered their draft cards in protest over the war. It is commonly accepted that General Hershey's edict was issued because of his well pub-

licized aversion to those who protest the war. The General, in his own words, believes that those who protest the war are not acting in the "national interest," are under the influence of "misdirected emotions," are acting pursuant to "illegal advice" or are engaged in "vicious efforts to cripple if not destroy, the unity vital to" our nation and liberties. It is commonly accepted, and the government has never to our knowledge denied, that General Hershey has taken it upon himself to suppress dissent over the war by reclassifying and inducting people who protest against it. Thus, the reclassification and induction at issue here were undertaken pursuant solely to suppress communication. This case, therefore, is akin to *Stromberg* v. *California,* 283 U. S. 359 (1931), in which, as *O'Brien* pointed out, the government unlawfully penalized symbolic conduct because it thought that the message contained in the symbolic conduct was harmful. General Hershey apparently thinks symbolic protestors are delivering a harmful message and must therefore be punished by reclassification and induction.

If the government cannot meet the more lax standards of *O'Brien,* then, *a fortiori,* it cannot meet the more difficult burden, established by pre-*O'Brien* balancing cases, of showing that it can penalize petitioner because the surrender of draft cards in protest over the war poses a substantial danger to the government's interest in effectively raising armies.

This Court has taken pains to point out that fundamental rights cannot be denied merely because their denial will provide some administrative benefits.[63] Indeed, it may be observed that, if the denial of important rights could be

[63] *Carrington* v. *Rash,* 380 U. S. 89, 96 (1965); *Rinaldi* v. *Yeager,* 384 U. S. 305, 310 (1966).

justified so long as the denial gives rise to some administrative benefits, there would soon be no rights or liberties left, since the work of administrative bureaucracies is always simplified by political suppression. Thus, the government ought not be able to penalize the surrender of cards unless such penalties assure administrative benefits which are necessary if selective service is to operate effectively and which are also necessary to avoid a substantial danger to a compelling government interest. We believe it clear that reclassifying and inducting men who surrender their cards do not give rise to such significant benefits, but rather, when considered in the overall operation of the selective service system, give rise only to inconsequential benefits.

That penalizing the surrender of cards does not give rise to administrative benefits which are necessary to an effective selective service system and which are therefore necessary to avoid a substantial danger to the government's interest in an effective draft is shown by the very fact that the government could efficiently raise armies even if nobody carried draft cards. It is also shown by analyzing the reasons commonly given in support of penalizing men who, for one reason or another, do not carry draft cards.[64] First, it has been asserted that the availability of registration certificates and notices of classification makes it easier to determine if a man is delinquent in his draft obligations,[65] and it is quite true that these cards will show whether a man has at least registered with selective service. However, the question of failure to register, as well as most other

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[64] These reasons have also been analyzed in Velvel, *supra*, note 56, at 163-166.

[65] *O'Brien* v. *United States*, 88 S. Ct. at 1680; *United States* v. *Miller*, 367 F. 2d 72, 80-81 (2d Cir. 1966), cert. den. 386 U. S. 911 (1967).

questions of delinquency, never arise with regard to the overwhelming majority of registrants. Further, government agents do not generally ask people to show their registration certificates or notices of classification in order initially to detect delinquencies. When government agents ask a person to show these cards, it is usually because the government already knows about a delinquency. Even if a registration certificate and notice of classification do to some degree aid in the detection of delinquents, this aid is still available when a man surrenders his card. For unlike the burning of draft cards which was at issue in *O'Brien*, cards which are surrendered remain "continuingly available" (88 S. Ct. at 1679, 1681, 1682) to Selective Service.

Another reason which has been given in support of penalizing men who do not carry draft cards is that the cards help in case of confusion in the registrant's file or its destruction.[66] The fact is, however, that the government has duplicate files on every registrant and can obtain necessary information in that way. Moreover, unlike the burning of cards, their surrender leaves them "continuingly available" in case a file is mixed up or destroyed. And if the files of a local board are destroyed by fire or other mishap, and the board wishes to rebuild them by contacting registrants, the board would first have to consult the Selective Service System's duplicate files in order to know whom to contact. Since it must consult the duplicate file anyway, the board might as easily secure the necessary information from that file rather than go through the additional and unnecessary effort of also contacting the registrants.

It has been asserted that the carrying of draft cards provides an administrative benefit because, in a time of

[66] *O'Brien*, 88 S. Ct. at 1680; *Miller*, 367 F. 2d at 81.

national crisis, they provide a quick means of determining a man's fitness for immediate induction no matter how distant he may be from his local board.[67] However, the registration certificate which petitioner surrendered does not tell a man's eligibility for induction since it does not give his classification. And in the national crisis presented by a thermonuclear attack, the overwhelming destruction of life and property suffered by both sides would make it irrelevant and impossible to induct large numbers of men immediately. Immediate induction is also irrelevant and has not been practiced in short term crises such as occurred in Lebanon and the Dominican Republic, since they are over long before men can be inducted and trained. And, immediate induction of men is irrelevant and has not been practiced in regard to long term crises such as Korea and Vietnam, where the government has adequate time to induct and train men.

It has been asserted that the carrying of draft cards provides an administrative benefit because it facilitates communication between registrants and draft boards,[68] by bearing the registrant's address and selective service number, and classification. Granting that communication is facilitated by the cards, cards which are surrendered, unlike cards which are burned, remain "continuingly available" to provide the necessary information to facilitate communication. Furthermore, the number of young men who are so unconcerned with their draft status as not to know their classification, but who nevertheless have sufficient intelligence to meet the armed forces mental standards, must be

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[67] *Ibid.*

[68] *Ibid.*

de minimis. Even when a person surrenders his Registration Certificate, he can still obtain the address of his local board, his selective service number, and his classification, from his Notice of Classification.

It has been asserted that draft cards provide an administrative benefit because they aid in detecting and tracing alterations, forgeries or other deceptive misuses of certificates.[69] However, unlike the case when draft cards are destroyed by burning, the surrender of a card may be said to increase the possibility of obtaining this benefit.

In sum, if, as petitioner believes, the government must prove a *substantial* danger to a compelling interest before it can penalize the surrender of draft cards, then the government has no power to reclassify and induct young men who surrender their draft cards as a protest over the war. For the government cannot show that the surrender of cards poses a substantial danger to the power to raise armies, and has never even made the attempt to do so.[70] It is true that the carrying of cards provides some administrative benefits to selective service, but selective service can be administered very effectively though cards are surrendered as a protest, and therefore no *substantial* danger arises when selective service does not obtain whatever administrative benefits accrue when citizens are punished for surrendering draft cards.

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[69] 88 S. Ct. at 1680.

[70] Even when Congress passed the law banning draft card burnings, a law which, as the foregoing text shows, gives rise to somewhat greater administrative benefits than are engendered by penalizing the surrender of draft cards, Congress neither gathered nor produced any factual evidence whatsoever to show that the burnings posed a *substantial* danger to selective service.

IV.

There is in fact no independent requirement of personal possession of registration certificates.[71]

Selective Service Regulation 1617.1 is titled "Effect of failure to have unaltered registration certificate in personal possession." It states first that every registrant must have his registration certificate in his personal possession at all times. The second sentence reads "The failure of any person to have his Registration Certificate (SSS Form 2) in his personal possession shall be prima facie evidence of his failure to register." Given the title, the first two sentences, and the historical background of this Regulation, it should be clear that the second sentence provides the exclusive sanction for non-possession of a registration certificate.

The initial possession Regulation under the Selective Service Act of 1917 stated that registrants would spare themselves much "inconvenience" if they carried their certificates at all times.[72] This was a reference to the fact that police officers had the duty of searching out those persons

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[71] The material in this section is based upon Dranitzke, The Possession of Registration Certificates and Notices of Classification by Registrants Under the Selective Service System, 1 S.S.L.R. 4029 (1968).

[72] The regulation (paragraph 62) provided:

> All persons registered will be furnished a registration certificate. Since all police officers of the Nation, States, and municipalities are required to examine the registration lists and make sure that all persons liable to registration have registered themselves, much inconvenience will be spared to those who are registered if they will keep these certificates always in their possession. All persons of the designated ages must exhibit their certificates when called upon by any police officer to do so.

who, although liable for registration under Sec. 5 of the 1917 Act, had not registered.[73] Such persons were taken by the police to the jail pending further instructions from the local board. During World War I, mass roundups or slacker raids were conducted by the police as a means of ensuring registration. "The individuals who were over age, or who had changed their suits of clothes that morning, or who for any other reason did not have their cards with them, lost several hours of time and were subjected to the seeming indignity of being herded together."[74] Thus, if a registrant did not carry his card, he would not be able to prove immediately that he had registered and would suffer the "inconvenience" of going to jail until he could satisfy the police that he had complied with law. The failure to possess a certificate in such circumstances was effectively treated as prima facie evidence of non-registration, at least for non-judicial purposes.

The initial regulations under the 1940 Act (as had the revised Regulations of 1917 and 1918), stated that registrants "should" carry their certificates.[75] Clearly, this was a

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[74] Selective Service System, Special Monograph No. 14, Enforcement of the Selective Service Law 13 [hereinafter cited as Monograph No. 14].

[73] See paragraph 16 of the initial 1917 Regulations and Sec. 49 of the revised 1917 Regulations.

[75] Regulations, paragraph 239 of Volume Two, "Registration," provided:

> After the registration card is completed and signed the registrar shall prepare the registration certificate and give it to the registrant. The registrar shall never fill out the certificate until after completely finishing the registration card. The registrant shall be warned that he should carry the registration certificate with him at all times, as he may be required to show it from time to time. The registrant should then be given a copy of the leaflet of instructions for registrants (Form 5).

warning to those who wanted to avoid the "inconvenience" of not being able to produce proof of registration immediately.

In 1941, the Regulation was amended to state that each registrant "must have" his certificate in his personal possession at all times. It was also expressly provided that non-possession constituted a violation of the regulations and was prima facie evidence of failure to register.[76] However, the former provision was removed after being in effect for 20 months.[77] The prima facie evidence proviso, on the other hand, has remained in the Regulation since the 1941 amendment. That non-possession was not a violation of the regulations before the addition of the "violation" clause is stated clearly by the Selective Service System, itself: "Failure to possess a Registration Certificate was not a violation prior to Apr. 17, 1941."[78] The implication is that unless this particular Regulation said "violation", the failure to possess a certificate was not a breach of the Selective Service rules. Thus, it appears that non-possession constituted a violation of the regulations only during 1941-1942. With the removal of the "violation" clause, the Regulation effectively read in the same way as had the 1917 Regulation.

This interpretation is bolstered by the history of the contemporaneous amendments to the World War II Regulations. The "violation" clause, as noted above, was added in March, 1941. Reg. 617.2, promulgated a year later, prohibited the wrongful possession of, wrongful trans-

[76] 6 Fed. Reg. 1796 (March 31, 1941). Amendment No. 22.

[77] 7 Fed. Reg. 9683 (Nov. 23, 1942). Amendment No. 101, 2d Ed. The Regulations had been renumbered and this regulation was numbered Sec. 617.1.

[78] Monograph No. 14 at 89.

fer of, or making, altering, forging, or counterfeiting of registration certificates; it also contained a "violation" clause.[79] Then on November 23, 1942, *at the same time* that the "violation" clause was deleted from Reg. 617.1, Reg. 623.61-2, which prohibited the wrongful possession of, wrongful transfer of, or making, altering, forging, or counterfeiting of notices of classification, was promulgated, and it contained a "violation" clause.[80] Both Reg. 617.2 and Reg. 623.61-2 retained these clauses while the World War II Regulations were in effect. And the present day counterpart of the latter still contains this clause.[81] The conclusion to be drawn from this series of amendments is that the "violation" clause was a necessary part of Reg. 617.1 in order for non-possession, [illegible] and of itself, to be punishable by criminal penalties or delinquency proceedings. Without this clause, the exclusive effect of non-possession was, and is now, only prima facie evidence of non-registration.[82]

That these contemporaneous changes in the Regulations were deliberate is established by the Selective Service System's official explanations of these amendments at the time. The purpose of Amendment No. 101, 2d Ed. which deleted the "violation" clause from Reg. 617.1, was

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[79] 7 Fed. Reg. 2086 (Feb. 15, 1942). Amendment No. 21, 2d Ed.

[80] 7 Fed. Reg. 9773 (Nov. 23, 1942). Amendment No. 102, 2d Ed.

[81] Reg. 1623.6. Reg. 617.2 was dropped in 1948.

[82] The intervening Regulation under the Selective Service Act of 1948 provided:

> 617.1 Effect of failure to have Registration Certicficate in possession. Every person required to present himself for and submit to registration must have a Registration Certificate (SSS Form No. 2) in his personal possession at all times. The failure of any person to have such Registration Certificate (SSS Form No. 2) in his personal possession shall be prima facie evidence of his failure to register.

> To provide that any representative of the Secretary of State, any representative of the Secretary of the Treasury, or any representative of the Attorney General, who has occasion to examine registrants at places of departure, may request a registrant to exhibit his Registration Certificate; to clarify the language concerning Selective Service officials who may request a registrant to exhibit his Registration Certificate; *to delete the language stating that it is a violation of the regulations to refuse to exhibit this certificate;* and, to add that a registrant shall surrender his Registration Certificate on becoming a member of the armed forces. (Emphasis added.)[83]

And the purpose of Amendment no. 102, 2d Ed., which added Reg. 623.61-2, was

> To require a registrant to have in his personal possession at all times a Notice of Classification (Form 57); *to make it a violation of the regulations to wrongfully possess, make, alter, forge, or counterfeit such form;* and, to provide for the issuance of a duplicate, lost, mislaid, stolen, or destroyed Notice of Classification in warranted cases. (Emphasis added.)[84]

Furthermore, this exclusivity of sanction argument is supported by the rationale later put forward by the Selective Service for the promulgation of the Regulation:

> In the early stages of the 1940-7 operation, it was found most difficult to affirmatively establish that a

[83] Selective Service Regulations, Second Edition, First Printing 437 (1944).

[84] *Ibid.*

> person required to do so, had not registered. To avoid this difficulty Selective Service provided by regulation that all registered persons must have with them at all times their 'registration cards.' It was a far simpler matter to ask a man for his certificate than to establish that he had not registered in any of the 120,000 places where he might have registered.[85]

The effect of this interpretation is that non-possession of a registration certificate is not a violation of the regulations in itself, but only prima facie evidence of another act which is a violation of the regulations and of the statute, *i.e.* non-registration.

This construction of Reg. 1617.1 is supported by examination of the history of Reg. 1623.5 which states that every registrant who has been classified must have his notice of classification in his personal possession at all times. Under Section 57 of the second set of 1917 Regulations, the final notice of classification, upon its issuance to a registrant, replaced the registration card as a means of identification, *i.e.*, as prima facie evidence of registration. Its possession likewise meant no "inconvenience" in the case of a slacker raid.[86]

With the passage of the 1940 Act, there was no immediate promulgation of a regulation pertaining to possession of notices of classification. In 1942, at the time of the deletion of the "violation" provision in the registration cer-

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[85] Selective Service System, Special Monograph No. 18, p. 122 (1967).

[86] As required by Section 279 of the 1918 Regulations, the reverse side of the Final Notice of Classification stated: "Failure to comply [with the law] may subject you to detention by the police and serious personal inconvenience."

tificate Regulation, a section entitled "Effect of failure to have Notice of Classification (Form 57) in personal possession" (Reg. 623.61-1) was promulgated. It stated that those persons who have been liable for service for 6 months must have their classification notices in their personal possession at all times; however, no "effect" was mentioned.[87]

Interpolating the history of Reg. 1617.1 through the initial title of the classification notice Regulation, it is evident that non-possession of a notice of classification was meant to be prima facie evidence of delinquency. If a person who should have a classification card did not, it would be prima facie evidence of his not keeping in contact with his local board, which is a duty of all registrants; for example, Reg. 1621.10 requires a registrant to return his classification questionnaire to his board and Reg. 1641.3 requires a registrant to report changes in mailing address. Support for this interpretation is gained from the fact that the Regulation only applied to those who had been liable for service for 6 months: it was reasonable to assume that any person who did not possess a notice of classification after that period was a delinquent. Furthermore, Reg. 623.61-1 (possession of notice of classification) was patterned after Reg. 617.1 (possession of registration certificate) as Reg. 623.61-2 (fraudulent possession of notices of classification) after Reg. 617.2 (fraudulent possession of registration certificate) and Reg. 623.61-3 (duplicate notice of classification) after Reg. 617.11 (duplicate registration certificate). To interpret non-possession of a notice of classification otherwise than as prima facie evidence of

[87] 7 Fed. Reg. 9773 (Nov. 23, 1942). Amendment No. 102, 2d Ed.

delinquency would leave the original title "Effect of failure to have Notice of Classification . . ." without meaning.

The interpretation gains strong support from the Selective Service's rationale for the issuance of this Regulation in 1942:

> The new requirement had two main purposes. It was thought that requiring the possession of a Notice of Classification would encourage many men who registered but were out of contact with their local boards to get in touch with them and by so doing effect a termination of their delinquencies. The change also places law enforcement officers in a position to hold a suspected delinquent in custody if he did not have a DSS Form 57 in his possession even though he did have a registration certificate. They could determine whether the individual was delinquent before releasing him.[88]

Moreover, when Reg. 623.61-1 (possession of notice of classification) was prescribed in 1942, it contained no "violation" clause whereas Reg. 623.61-2 (wrongful or fraudulent possession or alteration of notices of classification), which was part of the very same amendment, did contain such a provision; the implication is that failure to possess a notice of classification was not a violation of the regulations. Non-possession of a classification notice is therefore only prima facie evidence of delinquency.

Thus, non-possession of draft cards is not *per se* a violation of the Selective Service Regulations—non-possession is simply prima facie evidence of another act which is a violation.

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[88] Monograph No. 14, at 55.

CONCLUSION

For the reasons set forth above, the judgment below should be reversed and the case remanded to the District Court with directions to enter judgment for petitioner.[89]

Respectfully submitted,

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August 1968

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[89] The Solicitor General suggested in his Memorandum for Respondents (p. 13 n. 5) that on remand to the District Court petitioner should have the opportunity to offer proof on the issue whether the amount in controversy exceeds $10,000. Though petitioner would be prepared to do so, he also intends to seek leave to amend the complaint's jurisdictional allegation to include 28 U. S. C. Sec. 1361 and requests the Court, in its remand order, specifically to direct the District Court to allow the amendment. See Byse and Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308 (1967).

APPENDIX

APPENDIX

THE NEW YORK TIMES, THURSDAY, NOVEMBER 9, 1967

Texts of Letter and Memo on the Draft

Special to The New York Times

WASHINGTON, Nov. 8—Following is the text of a letter, dated Oct. 26, to all members of the Selective Service system from the director of Selective Service Lieut. Gen Lewis B. Hershey, and of a memorandum, dated Oct. 24, from General Hershey on draft cards:

The Letter

The basic purpose and the objective of the Selective Service system is the survival of the United States. The principal means used to that end is the military obligation placed by law upon all males of specified age groups. The compexities of the means of assuring survival are recognized by the broad authority for deferment from military service in the national health, safety, or interest.

Important facts, too often forgotten or ignored, are that the military obligation for liable age groups is universal and that deferments are given only when they serve the national interest. It is obvious that any action that violates the military selective service act or the regulations, or the related processes cannot be in the national interest.

It follows that those who violate them should be denied deferment in the national interest. It also follows that illegal activity which interferes with recruiting or causes refusal of duty in the military of naval forces could not by any stretch of the imagination be construed as being in support of the national interest.

The Selective Service system has always recognized that it was created to provide registrants for the armed forces, rather than to secure their punishment for disobedience of the act and regulations. There occasionally will be registrants, however, who will refuse to comply with their legal responsibilities, or who will fail to report as ordered, or refuse to be inducted. For these registrants, prosecution in the courts of the United States must follow with promptness and effectiveness. All members of the Selective Service system must give every possible assistance to every law enforcement agency and especially to United States attorneys.

It is to be hoped that misguided registrants will recognize the long-range significance of accepting their obligations now, rather than hereafter regretting their actions performed under unfortunate influences of misdirected emotions, or possibly honest but wholly illegal advice, or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation and the preservation of the liberties of each of our citizens.

Demonstrations, when they become illegal, have produced and will continue to produce much evidence that relates to the basis for classification and, in some instances, even to violation of the act and regulations. Any material of this nature received in national headquarters or any other segment of the system should be sent to state directors for forwarding to appropriate local boards for their consideration.

A local board, upon receipt of this information, may reopen the classification of the registrant, classify him anew, and if evidence of violation of the act and regulations is established, also to declare the registrant to be a delinquent and to process him accordingly. This should include all registrants with remaining liability up to 35 years of age.

If the United States Attorney should desire to prosecute before the local board has ordered the registrant for induction, full cooperation will be given him and developments in the case should be reported to the state director and by him to national headquarters.

Evidence received from any source indicating efforts by nonregistrants to prevent induction or in any way interfere illegally with the operation of the Military Selective Service Act or with recruiting or its related processes, will be reported in as great detail as facts are available to state headquarters and national headquarters so that they may be made available to United States attorneys.

Registrants presently in classes IV-F or I-Y who have already been reported for delinquency, if they are found still to be delinquent, should again be ordered to report for physical examination to ascertain whether they may be acceptable in the light of current circumstances.

All elements of the Selective Service system are urged to expedite responsive classification and the processing of delinquents to the greater possible extent consistent with sound procedure.

Memorandum

Subject: Disposition of Abandoned or Multilated Registration Certificate and Notices of Classification.

1. Whenever an abandoned or mutilated registration certificate or current notice of classification reaches a local board, and the card was originally issued to a registrant by some other board, it should be forwarded to the state director of selective service, who will forward it to the appropriate local board if within the state, or the appropriate state director if the board of origin is outside the state.

2. Whenever a local board receives an abandoned or mutilated registration certificate or current notice of classification which had been issued to one of its own registrants, the following action is recommended:

(A) Declare the registrant to be delinquent for failure to have the card in his possession.

(B) Reclassify the registrant into a class available for service as a delinquent.

(C) At the expiration of the time for taking an appeal, if no appeal has been taken, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States attorney for prosecution.

(d) If appeal is taken and the registrant is retained in a class available for service by the appeal board, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States Attorney for prosecution.

DELINQUENCY NOTICE

20 October 1967
(Date Becomes Delinquent)

7 November 1967
(Date of Mailing)

SELECTIVE SERVICE SYSTEM
LOCAL BOARD NUMBER 11
POST OFFICE BOX NUMBER 2105
CHEYENNE, WYOMING 82001
(Local Board Stamp)

SELECTIVE SERVICE NO.			
48	11	44	176

To JAMES (First) JAY (Middle) OESTERREICH (Last)

Address 215 Herrick Road
(Street and Number or RFD Route)

Newton Centre (City, Town, or Village) Massachusetts (State) 02159 (ZIP Code)

1. You are hereby notified that this Local Board has declared you to be a delinquent because of your failure to perform the following duty or duties required of you under the selective service laws:

"Failure to have in his possession a duly authorized Registration Certificate (SSS Form 2)"

"Failure to provide the local board of his current status"

2. You are hereby directed to report to this Local Board immediately in person or by mail, or to take this notice to the Local Board nearest you for advice as to what you should do.

3. Your willful failure to perform the foregoing duty or duties is a violation of the Universal Military Training and Service Act, as amended, which is punishable by imprisonment for as much as 5 years or a fine of as much as $10,000, or by both such fine and imprisonment.

(Member or Clerk of Local Board)

INSTRUCTIONS

A Delinquency Notice (SSS Form 301) shall be prepared by the Local Board whenever it declares the registrant to be a delinquent because of his failure to perform any duty or duties required of him other than failure to comply with an Order to Report for Induction (SSS Form 252), or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153). This notice shall be prepared in triplicate, and the specific duty or duties which the registrant has failed to perform shall be described in detail in the space provided. The Local Board shall (a) mail the original to the registrant at his last known address, (b) file a copy in the registrant's Cover Sheet (SSS Form 101), and (c) mail a copy to the State Director of Selective Service.

SSS Form 304 (10-8-64)

U.S. GOVERNMENT PRINTING OFFICE : 1964 O—747 610

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 46

JAMES J. OESTEREICH, PETITIONER

v.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 11, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (A. 20) is reported at 390 F. 2d 100. The opinion of the district court (A. 13–18) is reported at 280 F. Supp. 78.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1968 (A. 19). The petition for a writ of certiorari was filed on March 19, 1968, and was granted on May 20, 1968 (391 U.S. 912). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner, a student preparing for the ministry, was reclassified as a delinquent and ordered to report for induction into the Armed Forces, because of his failure to keep his registration certificate in his possession and his failure to keep his local draft board informed of his current status. He brought the instant suit to enjoin his induction. The questions presented are:

1. Whether the language of amended Section 10(b)(3) of the Military Selective Service Act, considered alone, bars judicial review of petitioner's Selective Service classification prior to his induction, and, if so, whether the statute is constitutional.

2. Assuming that pre-induction judicial review must be made available where First Amendment claims are asserted, whether petitioner's claims—that the delinquency regulations are impermissibly vague, and that non-possession of registration certificates may not be prohibited where intended as a form of "symbolic speech"—are substantial.

3. Whether petitioner's delinquency reclassification, pursuant to Selective Service regulations, was authorized by the Act, and, if so, is consistent with the Constitution.

4. Whether petitioner's challenges to the procedures followed by his local board may be raised in a pre-induction suit, and, if so, whether these challenges are meritorious.

5. Whether petitioner's status as a ministerial student exempted by statute from military training and service renders the jurisdictional bar of Section 10

(b)(3) inapplicable so as not to prevent a district court from entertaining his pre-induction suit.

STATUTES AND REGULATIONS INVOLVED

Section 10(b)(3) of the Military Selective Service Act of 1967, amending 50 U.S.C. App. 460(b)(3), Public Law 90–40, 81 Stat. 100 *et seq.*, provides as follows:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

Section 6(g) of the Selective Service Act, 50 U.S.C. App. 456(g), provides as follows:

> Regular or duly ordained ministers of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been preenrolled shall

be exempt from training and service (but not from registration) under this title.

Section 1617.1 of the Selective Service System regulations (32 C.F.R. 1617.1) provides:

> EFFECT OF FAILURE TO HAVE UNALTERED REGISTRATION CERTIFICATE IN PERSONAL POSSESSION.
>
> Every person required to present himself for and submit to registration must, after he has registered, have in his personal possession at all times his Registration Certificate (SSS Form No. 2) prepared by his local board which has not been altered and on which no notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. The failure of any person to have his Registration Certificate (SSS Form No. 2) in his personal possession shall be prima facie evidence of his failure to register. * * *

Section 1642.4(a) of the Selective Service System regulations (32 C.F.R. 1642.4(a)) provides:

> DECLARATION OF DELINQUENCY STATUS AND REMOVAL THEREFROM.
>
> (a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

STATEMENT

Regulations of the Selective Service System authorize local boards to reclassify as a delinquent any reg-

istrant who "has failed to perform any duty or duties required of him under the selective service law * * *" (32 C.F.R. 1642.4(a)),[1] and require that such a delinquent be given the highest priority for induction into the Armed Forces (32 C.F.R. 1631.7(a)(1)). Pertinent regulations also require registrants to have their registration certificates in their personal possession at all times (32 C.F.R. 1617.1), and to keep their local boards currently informed of their occupational, marital, family, dependency and military status (32 C.F.R. 1641.7).

On October 20, 1967, petitioner's registration certificate was turned in, along with others, to the Department of Justice in protest against the government's involvement in Vietnam (A. 3, 7). His local board, on November 7, 1967, declared him a delinquent on two grounds: (1) "failure to have in his possession a duly authorized registration certificate (SSS Form 2)," and (2) "failure to provide the local board [with notice] of his current status" (A. 4).[2] On the same day, petitioner, who previously had a IV–D classification as a ministerial student, was reclassified as I-A (*ibid.*). After an unsuccessful administrative appeal, he was ordered, by a notice dated December 27, 1967, to report for induction into the Armed Forces on January 24, 1968 (*ibid.*).

Petitioner then filed an action in the District Court for the District of Wyoming, where his local board

[1] "Selective service law" is defined to include regulations issued under the Military Selective Service Act (32 C.F.R. 1602.10).

[2] It should be noted that the record, which consists solely of petitioner's complaint, does not show the factual basis of this alternative ground (see note 26, *infra*).

is located, to restrain his induction. After considering the pleadings and conducting a hearing, the district court dismissed the complaint, relying upon the prohibition of pre-induction judicial review of Selective Service classifications contained in Section 10(b)(3) of the Military Selective Service Act of 1967 (50 U.S.C. App. 460(b)(3), as amended, 81 Stat. 104), and petitioner's apparent failure to comply with the $10,000 jurisdictional amount required by 28 U.S.C. 1331 (A. 13–18). The Tenth Circuit affirmed, "for the reasons set forth in the memorandum decision of the trial court and particularly in view of the jurisdictional restrictions contained in 50 App. U.S.C. § 460 (b)3" (A. 20). Petitioner's induction has been stayed pending final disposition of the instant case by this Court.

SUMMARY OF ARGUMENT

Section 10(b)(3), as amended in 1967 by Public Law 90–40, proscribes any "judicial review * * * of the classification or processing of any registrant" by the Selective Service System, "except as a defense to a criminal prosecution * * * after the registrant has responded either affirmatively or negatively to an order to report for induction * * *." That statutory provision is a proper exercise of the congressional power to raise and support Armed Forces (U.S. Const., Art. I, Sec. 8) and to prescribe the scope of the jurisdiction of the lower federal courts (U.S. Const., Art. III, Sec. 1). It precludes judicial review in the instant case insofar as petitioner seeks to have his induction enjoined on constitutional grounds. How-

ever, because of its particular facts, this case raises the additional problem of whether Section 10(b)(3) is applicable where a draft board has utilized the delinquency regulations to cause the reclassification and order the induction of a ministerial student expressly exempted from military training and service under another section of the Act—Section 6(g). On that latter question, the Solicitor General and the Selective Service System take different positions, and the views of both are set forth for the Court's consideration (*infra*, pp. 58–73).

I. Section 10(b)(3) in terms bars judicial review of any Selective Service classification prior to induction. What the section essentially seeks to do is to postpone, not to deny, judicial review of Selective Service System actions and orders. Under the statute, a registrant, in order to obtain judicial review, must either refuse induction and risk criminal prosecution, or submit to induction and seek a writ of habeas corpus. Although this scheme subjects a registrant to some risk and hardship before being permitted to challenge his classification and induction in the courts, Congress made the considered judgment that the need for postponing judicial review in Selective Service cases outweighs such countervailing considerations. As the legislative history shows, the basic congressional purpose was to prevent the "litigious interruption" of the operation of the classification and induction process which would result from the availability of pre-induction judicial review.

If the courts were to entertain suits challenging classifications prior to induction, it would frequently

be necessary to issue preliminary injunctions to prevent induction from mooting such suits before a final decision could be rendered. Many registrants would be likely to sue in order to obtain the delays occasioned by such interim relief. Registrants thus could utilize the courts to postpone their induction, thereby requiring others to take their places in the draft quotas. By delaying judicial review until after induction, the national interest in the effective functioning of the Selective Service System is preserved, while individual rights can nonetheless be vindicated through post-induction review.

The presence of a First Amendment claim in this case does not make the application of Section 10(b)(3) unconstitutional. Petitioner argues that the burdens involved in obtaining judicial review in the manner contemplated by the statute would result in a "chilling effect" on First Amendment rights, relying on *Dombrowski* v. *Pfister*, 380 U.S. 479, 487-489. But the circumstances which led this Court in *Dombrowski* to hold that an injunctive action to prohibit a pending criminal prosecution was available to vindicate First Amendment rights are not presented here. Unlike the situation in *Dombrowski*, registrants subject to induction orders are assured of a "prompt judicial resolution of First Amendment claims" (380 U.S. at 489) pursuant to the ordinary means of judicial review. Moreover, at least here and in similar cases, the registrant's challenge to his induction presents narrow, well-defined legal questions which, unlike those in *Dombrowski*, would not require a "series of * * * criminal prosecutions" to resolve (*ibid.*). In

Cameron v. *Johnson*, 390 U.S. 611, 618–619, this Court recently held *Dombrowski* inapplicable where no showing of "special circumstances" (380 U.S. at 484) had been made, noting that there, in contrast to *Dombrowski*, the prosecutions sought to be enjoined were "for violation of a statute narrowly regulating conduct which is intertwined with expression * * *" (390 U.S. at 618).

II. Petitioner's failure to comply with the possession requirement made him a delinquent and subject to reclassification. The pertinent regulation does not make prima facie evidence of failure to register the sole consequence of non-possession. The first sentence of the regulation states that each registrant must have his registration certificate "in his personal possession at all times." The deletion in 1942 of language in the regulation creating an explicit duty to do so did not change a registrant's basic obligation. Many Selective Service regulations recognized as imposing duties on registrants do not explicitly state that failure to comply therewith constitutes a violation.

III. The requirement that registrants keep their regisration certificates in their possession at all times is a valid regulation incident to the proper functioning of the Selective Service System; the claim that surrender of the certificate is protected by the First Amendment as a form of "symbolic speech" is no more valid than the similar claim, recently rejected by this Court, that destruction of a registration certificate is protected by the First Amendment. *United States* v. *O'Brien*, 391 U.S. 367.

Contrary to petitioner's contention, the delinquency regulations are not so vague as to abridge First

Amendment rights. Those regulations simply incorporate the duties imposed on registrants by the Selective Service Act and regulations, none of which petitioner has shown to be impermissibly vague or overbroad. The requirements involved here—carrying a registration certificate and keeping the local board informed of one's status—are specific and narrow.

IV. Petitioner attacks his reclassification as a delinquent on the ground that it constitutes the imposition of punishment without the procedural protections required for criminal prosecutions. Induction into the Armed Forces, however, is not a penalty. While military service undoubtedly involves certain hardship and restraint, it also represents a duty commonly owed by all citizens, and in no way involves the stigma which ordinarily attaches to criminal punishment. In addition, the delinquency regulations are designed as an administrative means of insuring that registrants comply with the duties they owe to the local boards and the Selective Service System generally, and thus may be analogized to civil contempt procedures. In essence, those regulations seek to render self-defeating any attempt by the registrant to cut himself off from contact with the Selective Service System. Therefore, the delinquency procedure is basically remedial rather than punitive in nature.

But there are some disquieting circumstances surrounding the delinquency reclassifications of petitioner and others who, like him, have violated their duties as registrants by engaging in protest activity. General Hershey's letter of October 26, 1967, which in effect called upon local boards to apply the delinquency re-

classification procedure to "misguided registrants" who engage in "illegal activity" in "violation of the act or regulations" (Pet. Br. App. 1a), appears to have invited local boards to undertake such reclassification in a punitive fashion. Against this background, there is a serious question whether the delinquency regulations are being applied in a manner consistent with the Selective Service Act and the Constitution.

In view of the specific exemption from involuntary military service that Congress has provided for certain categories of individuals and the criminal penalties it has prescribed for violation of a registrant's statutory duties, it is doubtful that Congress intended to permit local boards to reclassify and induct a registrant for any violation of the Act or regulations, regardless of its relation to his status as exempt, deferred, or otherwise. Moreover, although the regulations permit local boards to restore a registrant's prior classification if he remedies his delinquency, they are not required to do so. Delinquency reclassification thus cannot be wholly analogized to civil contempt, since a court cannot continue to subject an individual to sanctions once his compliance has been obtained.

Delinquency reclassification, at least as applied in circumstances like those involved here, also presents constitutional problems. There is a question whether Congress, if it has authorized such reclassification, has provided sufficient standards to guide the local boards, and whether there is a sufficient nexus between the violation that triggers reclassification and induc-

tion and the registrant's status *vis-à-vis* the Selective Service System. Moreover, some of the "tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character" (*Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168) suggest that the delinquency reclassification of petitioner constituted punishment, which was imposed without the constitutional safeguards prescribed for criminal trials.

The question is a difficult one, and the Court need not reach it if it accepts our position (*infra*, pp. 58-66) that delinquency reclassification is unauthorized with respect to registrants who have an express statutory exemption. If that position is accepted, however, it tends to confirm that delinquency reclassification as presently practiced is inconsistent with the Act and probably also unconstitutional.

V. In his complaint, petitioner alleged that he is pursuing a full-time course of instruction in a recognized divinity school, and that he was declared a delinquent and reclassified I-A after he had turned in his draft card. Section 6(g) of the Selective Service Act expressly exempts ministerial students from "training and service" under the Act, and contains no exception for such students who become delinquent. On the other hand, Section 10(b)(3) contains no exception to its sweeping provision that "No judicial review shall be made of the classification or processing of any registrant * * * except as a defense to a criminal prosecution." Although these two provisions of the same statute are not necessarily

inconsistent, there are serious problems of construction in reconciling them.

The unqualified language of Section 10(b)(3) that "[n]o judicial review" of classifications shall be had except as a defense to a criminal prosecution is in fact subject to the qualification that classification may be reviewed through habeas corpus after induction. Moreover, although the ministerial exemption can be fully recognized in a criminal or habeas corpus proceeding, requiring a registrant claiming such status to utilize such procedures subjects him to serious risks which Congress may not have intended. There are also constitutional overtones to the problem. An order to report for induction restrains the freedom of movement of the person who receives it; petitioner's complaint alleges that he turned in his draft card "for the sole purpose of expressing dissent" (A. 3); and the fact that petitioner was declared a delinquent and immediately reclassified I-A without a hearing raises questions under the Fifth Amendment. Finally, the grant of an exemption to ministers from "training and service" under the Selective Service Act is deepseated in our history and tradition, and touches on an area involving First Amendment considerations.

The Solicitor General concludes that, in view of the whole complex of factors here, including (a) the constitutional doubts which might otherwise be raised, and (b) the clear exemption specifically granted by Congress, without qualification, to ministerial students, the statutory provisions involved can best be

reconciled by permitting petitioner to maintain a pre-induction suit challenging his induction order.

The Selective Service System does not agree with those arguments. In order that the Court may have the benefit of its responsibly held views on the issue, we have also set forth its legal position.

The Selective Service System believes that the language of Section 10(b)(3), which provides that there shall be "[n]o judicial review" prior to induction, is clear and unambiguous, and leaves no room for any exception for ministerial students. It believes that the considerations upon which the Solicitor General relies to justify an exception for ministerial students would apply equally to other claims that local boards have acted contrary to the Constitution, the Act or the regulations, and that the practical effect of permitting pre-induction review of classifications would be seriously to interfere with the efficient operation of the Selective Service System. It believes that permitting such suits will lead to many temporary injunctions against induction, and that the result would be to permit those very "litigious interruptions" to the induction process that Congress sought to prevent in barring pre-induction judicial review. The Selective Service System also believes that the delinquency regulations may be applied to a registrant even though he is entitled to a statutory exemption. It points out that such registrants are exempt only from "training and service," and not from registration; and it contends that the regulations are a reasonable means of insuring that all registrants perform their statutory duties relating to registration.

ARGUMENT

INTRODUCTION

This case can be viewed in a broad light, in which event it involves many difficult problems arising under the Selective Service laws. Or it can be viewed in a much narrower way as involving a rather special question arising from the fact that the petitioner here falls within a particular exemption granted by Congress from "training and service" under the Act.

The Court granted certiorari without restrictions; and the case has been broadly briefed on behalf of petitioner. Accordingly, we have discussed the broad questions at some length in this brief. This is put first in the brief, not because we think the broad questions must be decided here, but because the broader discussion provides a useful background for consideration of the narrower issue.

Some of the problems are difficult, and divergent views are held about them. For this reason, an effort has been made to explore the issues carefully and to present some varying arguments which seem to be worthy of the consideration of the Court.

The comprehensive discussion of the issues is presented in points I–IV, at pp. 16–58, below. The narrower issue, on which the case may be decided, is discussed in point V, at pp. 58–74 below. In connection with this issue, although a position is taken, an effort has been made to present countervailing arguments which are strongly held by some government officials, in order that all arguments relevant to the issues may be fully and fairly presented to the Court.

I. SECTION 10(b)(3), WHICH BARS JUDICIAL REVIEW OF SELECTIVE SERVICE CLASSIFICATIONS PRIOR TO INDUCTION, IS CONSTITUTIONAL, EVEN AS APPLIED TO CASES IN WHICH FIRST AMENDMENT CLAIMS ARE MADE.

A. The statute and its legislative history

Section 10(b)(3), as amended in 1967 by Public Law 90-40, in terms bars judicial review of any Selective Service classification prior to induction. In pertinent part, that section provides:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction * * *.

The congressional purpose in enacting this section—which was passed as part of the 1967 amendments to the Selective Service Act—was clear. As stated by the Chairman of the Senate Armed Services Committee, elimination of pre-induction judicial review was necessary "to prevent litigious interruptions of procedures to provide necessary military manpower" (113 Cong. Rec. S8052 (June 12, 1967) (Sen. Russell)).

Prior case law had also established the rule that judicial review of draft classifications could not be obtained until after induction. *E.g., Falbo* v. *United States,* 320 U.S. 549, 551-555; *Witmer* v. *United States,* 348 U.S. 375, 377; *Tamarkin* v. *Selective Service System, Local Draft Board, No. 47,* 243 F. 2d 108 (C.A. 5); *Watkins* v. *Rupert,* 224 F. 2d 47 (C.A. 2); *Schwartz* v. *Strauss,* 206 F. 2d 767 (C.A. 2), affirming

114 F. Supp. 438 (S.D. N.Y.); *Reap* v. *James*, 232 F. 2d 507 (C.A. 4). That approach had been grounded on earlier manifestations of congressional intent found in the pertinent legislation.

Prior to its amendment in 1967, 50 U.S.C. App. 460(b)(3) and its predecessors had provided simply that decisions of Selective Service boards "shall be final" at each administrative level.[3] Congress' purpose in using that language, the courts found, was to establish an expeditious and effective procedure for raising manpower for our country's military needs, without the delays caused by the exercise of judicial review prior to induction (see *Falbo* v. *United States*, 320 U.S. 549, 551–554). Over the years, however, courts had occasionally disregarded or refused to apply this rule. *Townsend* v. *Zimmerman*, 237 F. 2d 376 (C.A. 6); *Ex parte Fabiani*, 105 F. Supp. 139 (E.D. Pa.); *Tomlinson* v. *Hershey*, 95 F. Supp. 72 (E.D.

[3] That language was interpreted as not having been intended wholly to prohibit post-induction as well as pre-induction judicial review of Selective Service classifications, but as merely reflecting a congressional intent to give administrative action in the Selective Service context a more limited scope of review than customarily obtains, so that a classification could be invalidated only if "no basis in fact" therefor existed (*Estep* v. *United States*, 327 U.S. 114, 122–123). In *Estep* the Court distinguished *Falbo* on the ground that there the criminal defendant sought to challenge the local board's action without having pursued and exhausted his administrative remedies (327 U.S. at 123). In amended Section 10(b)(3), the "no basis in fact" standard for post-induction judicial review of classifications is explicity prescribed. In addition, in *Estep* the Court specifically referred to the alternative availability of habeas corpus as a means of obtaining post-induction review of classifications (see 327 U.S. at 123–125).

Pa.).[4] Shortly before the 1967 Selective Service Act amendments were considered by Congress, the Second Circuit, in a case that received widespread publicity, permitted pre-induction judicial review of the reclassification of certain student registrants, on the ground that resort to the courts, although otherwise premature, was permissible when First Amendment rights were clearly involved. *Wolff* v. *Selective Service Local Board No. 16,* 372 F. 2d 817 (C.A. 2).

The 1967 amendments to the Selective Service Act, as passed by the Senate, made no changes in the provision for judicial review. However, the Senate committee emphasized its belief that under the existing statute judicial review prior to induction was not

[4] Of the seven cases cited in petitioner's brief (pp. 43–44) as departing from the prevailing rule prior to enactment of amended Section 10(b)(3), only four actually permitted pre-induction judicial review: *Townsend* v. *Zimmerman*, 237 F. 2d 376 (C.A. 6) (in which the question of pre-induction review was not discussed and apparently was not considered by the court); *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817 (C.A. 2) (which was the decision that prompted the 1967 amendment of the section, and one of the cases that Congress intended to overrule); *Ex parte Fabiani*, 105 F. Supp. 139 (E.D. Pa.); and *Tomlinson* v. *Hershey*, 95 F. Supp. 72 (E.D. Pa.). *Glover* v. *United States*, 286 F. 2d 84 (C.A. 8) and *United States* v. *Willard*. 211 F. Supp. 643 (N.D. Ohio), were criminal prosecutions for failure to submit to induction, and thus did not involve any question of pre-induction review. In his concurring opinion in *Schwartz* v. *Strauss*, 206 F. 2d 767 (C.A. 2), Judge Frank expressed the view that pre-induction review might be available in some circumstances, although not in the situation presented in that case. The majority of the court, however, affirmed on the basis of the district court opinion (114 F. Supp. 438 (S.D. N.Y.)), which held that under no circumstances was pre-induction judicial review permissible.

permissible, stating (S. Rep. No. 209, 90th Cong., 1st Sess. 10):

> Until recently, there was no problem in the observance of the finality provision. In several recent cases, however, district courts have been brought into selective service processing prematurely. The committee attaches much importance to the finality provisions and reemphasizes the original intent that judicial review of classifications should not occur until after the registrant's administrative remedies have been exhausted and the registrant presents himself for induction.

The House Armed Services Committee, however, concluded that merely including in the legislative history a reaffirmation of the original congressional intent was not sufficient, and that the statute should be amended so as explicitly to overrule those few judicial decisions that had allowed pre-induction judicial review. Accordingly, the House committee inserted the language that was finally adopted by the House and accepted by the Senate in conference (H. Conf. Rep. No. 346, 90th Cong., 1st Sess.). The report of the House committee pointedly explained (H. Rep. No. 267, 90th Cong., 1st Sess. 30–31, reprinted at 1967 U.S. Code Cong. & Admin. News 1308, 1333):

> The committee was disturbed by the apparent inclination of some courts to review the classification action of local or appeal boards before the registrant had exhausted his administrative remedies. Existing law quite clearly precludes such a judicial review until after a registrant has been ordered to report for induction and

has responded either affirmatively or negatively to such an order. In view of this inclination of the courts to prematurely inquire into the classification action of local boards, the committee has rewritten this provision of the law so as to more clearly enunciate this principle. The committee was prompted to take this action since continued disregard of this principle of the law by various courts could seriously affect the administration of the Selective Service System.

This legislative history negatives petitioner's suggestion that Congress, in amending Section 10(b)(3), intended to codify those few prior cases which had departed from the general rule and had permitted pre-induction review. Petitioner also asserts that the congressional intent to overrule prior cases such as *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817 (C.A. 2) was addressed only to rulings that registrants could attack their classification prior to exhausting their internal remedies within the Selective Service System of administrative appellate review.[6] On

[6] Although the House Armed Services Committee report states that amended Section 10(b)(3) was intended to overrule cases reviewing classifications "before the registrant had exhausted his administrative remedies" (H. Rep. No. 267, 90th Cong., 1st Sess. 30), the next sentence of the report manifests an intent to codify existing law which "precludes such a judicial review until after a registrant has been ordered to report for induction and has responded either affirmatively or negatively to such an order" (*id.* at 30–31). The committee's reference to exhaustion of administrative remedies may be explained by the existence of judicial authority that a registrant has not exhausted all his administrative remedies—despite completion of adminis-

this matter, petitioner's suggestion is answered by the legislative history, for the primary congressional concern in enacting Section 10(b)(3) was with "litigious interruptions" of the induction process (113 Cong. Rec. S8052 (June 12, 1967) (Sen. Russell)). Such a "litigious interruption" occurs in any case where pre-induction review is sought, particularly where—as usually happens—the suit is not filed until shortly before induction is scheduled. In such circumstances, if there is to be any judicial review before induction, the induction order must be stayed, and a "litigious interruption" of the induction necessarily takes place. And such an interruption ordinarily occurs without regard to whether, and even though, the registrant may have exhausted his administrative remedies. Here, for example, petitioner brought his injunctive action shortly before his scheduled induction date, after completing his administrative appeals, and consequently has received successive stays of induction. This is precisely the sort of "litigious interruption" which Congress sought explicitly to preclude in Section 10(b)(3).

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trative appeals—until he has responded to the order for induction, since he may be rejected at the induction center. See, *e.g.*, *Falbo* v. *United States*, 320 U.S. 549, 553; see also *Billings* v. *Truesdell*, 321 U.S. 542, 558. Indeed, the current regulations (32 C.F.R. 1632.14(b)(6), 1632.15(e), 1632.16), clearly contemplate that a registrant may be found unqualified for induction into the Armed Forces by military personnel at the induction center.

B. The statute does not pose an unconstitutional barrier to judicial review

Section 10(b)(3), as amended in 1967, does not wholly preclude judicial review of a registrant's classification any more than did its predecessor (see note 3, *supra*). Rather, it maintains and makes explicit the congressional determination that such review should be postponed until after induction, or refusal to submit to induction. Petitioner suggests, however, that the practical effect of this scheme is to preclude effective review. Petitioner further argues that, in any event, because of the hardship involved in waiting until completion of the induction process before obtaining review, and since pre-induction review will not seriously disrupt the Selective Service System, the statute erects an unconstitutional barrier to judicial review.[6]

Under Section 10(b)(3), a registrant must either refuse induction and risk criminal prosecution, or submit to induction and seek a writ of habeas corpus, in order to obtain judicial review.[7] Refusal to submit to

[6] Petitioner's view has been accepted in three cases in the Northern District of California. *Petersen* v. *Clark*, Civil No. 47888; *Gabriel* v. *Clark*, Civil No. 49419; and *Scherbatskoy* v. *Local Board No. 76*, Civil No. 49259. The government intends to take a direct appeal to this Court in the *Gabriel* case. No appeal has been taken in the other two cases, since in *Petersen* the district court did not enjoin the registrant's induction nor his pending criminal prosecution for failure to submit to induction, and in *Scherbatskoy* the factual background as well as the legal issues are virtually identical to those in *Gabriel*.

[7] Section 10(b)(3) does not explicitly preserve the habeas corpus remedy. However, the prior cases clearly permitted habeas corpus to test the validity of induction. *Witmer* v. *United States*, 348 U.S. 375, 377; *United States ex rel. Reel* v. *Badt*, 152

induction involves a serious risk, since it subjects the registrant to the possibility of criminal punishment up to five years' imprisonment and a $10,000 fine (50 U.S.C. App. 462(a)). However, a registrant may file a petition for a writ of habeas corpus immediately after induction. Habeas corpus petitions must be accorded precedence on a court's calendar (see 28 U.S.C. 2243), thus keeping the registrant's time in service at a minimum if the court should rule his classification and resulting induction unlawful.[8] However short, that time may well be viewed as a hardship; but it is a hardship which the registrant would share in common with many other citizens.

F. 2d 627 (C.A. 2). The legislative history of Section 10(b)(3) shows that Congress intended to preserve the generally prevailing law with respect to judicial review of Selective Service classifications (see H. Rep. No. 267, 90th Cong., 1st Sess. 30–31). In addition, the statute expressly provides for review after the registrant has responded "affirmatively" to the induction order; such review could only be by habeas corpus, since there would be no basis for a criminal prosecution where there was an affirmative response to the order. There would, of course, be serious doubt as to its constitutional validity if the statute were read as purporting to abolish habeas corpus as a means of contesting the validity of induction (see U.S. Const., Art. I, Sec. 9).

[8] Such post-induction review is neither unattainable as a practical matter nor illusory in terms of substance. In *United States ex rel. Wilkerson* v. *Commanding Officer*, 68 Civ. 1721, decided June 20, 1968, the District Court for the Southern District of New York granted a writ of habeas corpus on the ground that no basis in fact had been shown for the local board's denial of a hardship deferment, and ordered the registrant, who had submitted to induction and promptly filed his habeas corpus petition, released forthwith from the Armed Forces. The government has determined not to appeal from this decision.

Indeed, even without the explicit provisions of the statute, there would be strong reasons for refusing to stay inductions simply to avoid imposing the hardship of some military service on a registrant seeking judicial review of his classification. Since each draft board must fill its quota, a preliminary injunction against the induction of a registrant who has filed suit would necessarily require the induction of another registrant to take his place; it would hardly be equitable to impose military service on one person, or at least accelerate his induction, simply to permit another to obtain pre-induction judicial review. Thus, any hardship involved in requiring that the habeas corpus route be taken may well be viewed as inherent in the fair administration of any system of conscription.

In addition to the hardship involved in military service during the period in which a court is considering a registrant's habeas corpus petition, the habeas corpus route involves an added difficulty for certain registrants who oppose military service for reasons of conscience. These are individuals whose opposition to military service is such that they would refuse to serve regardless of whether a court ultimately upholds the legality of their draft classification. To such an individual, the habeas corpus route is unacceptable because it means that if the court decides he was properly classified, he must complete his military service and is deprived of the alternative of going to prison as the result of a criminal prosecution for failing to submit to induction.

In such a case, however, it is not unreasonable to require the registrant to risk criminal punishment

in order to test the legality of his classification. Indeed, that risk is inherent in such a registrant's decision to regard the claims of his own conscience as being above the ultimate determination of the court. The only effect of Section 10(b)(3) in that situation is to require the registrant to choose between the risk of imprisonment and the risk of a short period of military service before judicial review can be obtained; a pre-induction suit would permit him to defer this choice until the review proceedings had been completed. He would, then, be forced to choose only if the court should sustain his classification. It is by no means clear that the Constitution requires that he be given that opportunity.

To the extent that hardship is involved in precluding pre-induction review, Congress has made a considered determination that the need for postponing judicial review outweighs any countervailing considerations. Such a legislative judgment should obviously be accorded great deference by the courts. This is not an area where the congressional authority to legislate is at all questionable. Indeed, the Court noted in *United States* v. *O'Brien,* 391 U.S. 367, 377, that "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping," citing, *inter alia, Lichter* v. *United States,* 334 U.S. 742, 755–758. Congress, acting pursuant to this "broad and sweeping" power, has made manifest its intent in amending Section 10(b)(3) in order, as noted earlier, "to prevent litigious interruption of procedures to

provide necessary military manpower" (113 Cong. Rec. S8052 (June 12, 1967) (Sen. Russell)).

If pre-induction review were generally available, many indivdiuals could be expected to bring suit—as indeed they have notwithstanding amended Section 10(b)(3)—in hopes of avoiding, or at least postponing, military service. Such suits could be anticipated even where the registrant has no expectation of ultimately showing his classification to be unlawful, since the delays occasioned by litigation may well justify the costs of bringing suit, even if ultimately unsuccessful. Moreover, in any case which is not frivolous on the face of the complaint, district courts could be expected to grant temporary restraining orders and preliminary injunctions against induction, since only in this manner could pre-induction challenges be saved from mootness. The fact that others had obtained such interim relief would in turn attract more similar suits.

The decision of Congress that the delays incident to pre-induction review would be contrary to the national interest finds a parallel in a provision of the Emergency Price Control Act of 1942 forbidding temporary injunctions against price control orders. This provision was upheld in *Yakus* v. *United States,* 321 U.S. 414, 437–443, despite the undeniable hardship in requiring a businessman to submit to possibly illegal price control orders during the course of time-consuming procedures for judicial review of such orders. Nonetheless, this Court concluded that Congress could validly place the public interest in prompt effectuation of price controls above the individual's interest in securing interim relief from pos-

sibly illegal administrative orders, stating (*id.* at 441–442):

> Here, in the exercise of the power to protect the national economy from the disruptive influences of inflation in time of war Congress has seen fit to postpone injunctions restraining the operations of price regulations until their lawfulness could be ascertained by an appropriate and expeditious procedure. In so doing it has done only what a court of equity could have done, in the exercise of its discretion to protect the public interest. What the courts could do Congress can do as the guardian of the public interest of the nation in time of war. * * *

As in the Emergency Price Control Act, Congress in the Military Selective Service Act did not preclude judicial review of administrative orders, but rather determined that the effectiveness of these orders was not to be delayed pending judicial review. Congress has always had a broad power to prescribe the modes of judicial review. *E.g., Lockerty* v. *Phillips*, 319 U.S. 182. Its conclusion that postponement of judicial review is necessary to prevent disruption of the induction process is no less a valid exercise of its constitutional authority than the similar determination upheld by this Court in *Yakus*.[9]

[9] Petitioner relies on *Ex parte Young*, 209 U.S. 123, and *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331. Those cases held that federal courts had jurisdiction to enjoin state proceedings under statutes relating to rate regulation, where the state statutes provided no means of review other than in a criminal prosecution for failure to comply with an order of the ratemaking commission. In neither of these cases, however, was

C. No exception from the coverage of Section 10(b)(3) is constitutionally required for cases involving First Amendment claims

Relying on the doctrine of *Dombrowski* v. *Pfister*, 380 U.S. 479, petitioner argues that pre-induction judicial review should be allowed at least in those Selective Service cases that present First Amendment claims. The First Amendment claims here asserted are that petitioner's action in turning in his registration certificate is a form of constitutionally protected "symbolic speech," and that the delinquency regulations are so broadly drafted as to permit administrative interpretations which abridge free speech.

In *Dombrowski* v. *Pfister*, 380 U.S. 479, state criminal prosecutions under a statute invalid on its face were enjoined on the ground that to restrict the presentation of First Amendment contentions to matters of defense in criminal proceedings would result in a "chilling effect" on First Amendment rights. In *Dombrowski*, however, a crucial consideration was that the plaintiffs were not assured a "prompt judicial resolution of First Amendment claims" incident to the normal means of judicial review (380 U.S. at 489).

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there an overriding public interest requiring postponement of judicial review, while here the national interest in the expeditious raising of military manpower supports postponement of review. In addition, in neither *Young* nor *Love* was there a federal statute requiring postponement of judicial review; all the Court was required to decide was that federal equity intervention was warranted because the forms of review open under state law were not adequate. Finally, in those two cases the only form of review under state law required the risk of criminal punishment. Here, by contrast, the registrant may obtain review on habeas corpus by submitting to induction.

That is not the situation here. If review is by habeas corpus, the case must receive precedence on the district court's calendar. And any criminal prosecution resulting from a refusal to submit to induction is required by the statute to be accorded precedence over other cases (see 50 U.S.C. App. 462(a), 462(c), as amended by Public Law 90–40).

Moreover, resolution of the First Amendment claims made in this and similar cases, unlike those in *Dombrowski,* would not require a "series of * * * criminal prosecutions" (380 U.S. at 489). The First Amendment questions which petitioner presents are specific and well-defined (cf. *Zwickler* v. *Koota,* 389 U.S. 241, 250), and there is no reason to believe that their resolution in a habeas corpus action, or a criminal prosecution for failure to submit to induction, would be any less expeditious than in a civil suit. If the administrative practices which petitioner here attacks are in violation of the First Amendment and do have a "chilling effect" on other draft-eligible individuals, a ruling to this effect in a habeas corpus or criminal proceeding would remove this effect just as quickly as the same ruling in a civil injunctive suit.

In any event, the *Dombrowski* doctrine does not have the sweeping scope that petitioner advances. This is shown by this Court's recent holding in *Cameron* v. *Johnson,* 390 U.S. 611. There the Court stated that *Dombrowski* was applicable only where "special circumstances" (380 U.S. at 484) had been shown, and not to prosecutions "for violation of a statute narrowly regulating conduct which is intertwined

with expression * * *'" (390 U.S. at 618). And, as noted in *Cameron,* the statutes under which the prosecutions were brought in *Dombrowski* "were patently unconstitutional on their face * * *" (390 U.S. at 619), in contrast to the situation presented there and here. In language of no less pertinence here, the Court in *Cameron,* relying on *Cox* v. *Louisiana,* 379 U.S. 559, 564, pointed out that "[a]ny chilling effect on * * * a form of protest and expression that flows from good-faith enforcement of [a] valid statute would not, of course, constitute that enforcement an impermissible invasion of protected freedoms" (390 U.S. at 619).

The "litigious interruption" which Congress sought to prevent by Section 10(b)(3) would be occasioned fully as much by suits alleging First Amendment violations, as by any other type of pre-induction action. It thus seems clear that Congress intended the statute to cover cases involving First Amendment questions. Indeed, *Wolff* v. *Selective Service Local Board No. 16,* 372 F. 2d 817 (C.A. 2), which Congress presumably intended Public Law 90–40 to overrule (see H. Rep. No. 267, 90th Cong. 1st Sess. 30–31, quoted *supra,* pp. 19–20), was a case in which a draft classification was attacked on First Amendment grounds. Unlike *Dombrowski,* there is in the instant case a federal statute which precludes pre-induction judicial review on the basis of a well-defined and long-standing federal policy to prevent litigious interruption in the raising of manpower for military service. At least in the absence of clearer indications that pre-induc-

tion judicial review is essential to the protection of First Amendment rights, that congressional policy should be given effect.

D. The existence of "special circumstances" does not justify pre-induction judicial review

Petitioner argues that, even if Section 10(b)(3) is generally valid and applicable to prevent pre-induction review, it should not be read to apply where "special circumstances" are present. While petitioner does not clearly define these "special circumstances," they would apparently be present, in his view, whenever it is claimed that a draft board acted without authority or beyond its jurisdiction.

Such an exception would deprive Section 10(b)(3) of any meaning. This is so because the only ground for reviewing draft board actions in any type of judicial proceeding—whether pre-induction or post-induction—is that the board acted without authority or beyond its jurisdiction (see *Estep* v. *United States*, 327 U.S. 114, 119–123). Section 10(b)(3) of the Selective Service Act, both before and after amendment in 1967, provided that decisions of Selective Service boards are "final" (50 U.S.C. App. 460(b)(3)), and this has been construed to mean that the judicial function is confined to ascertaining whether the board acted within its authority or jurisdiction (see note 3, *supra*).[10] Thus, to permit pre-induction review when-

[10] Moreover, Section 10(b)(3), as amended in 1967, makes explicit the "no basis in fact" standard of judicial review evolved by this Court in *Estep* (see note 3, *supra*).

ever it is claimed that the draft board acted beyond its authority or jurisdiction would be tantamount to concluding that pre-induction review is available for virtually any claim that would warrant post-induction review. The thrust and meaning of Section 10 (b)(3), which draws a sharp distinction between pre-induction and post-induction review, would be effectively nullified by such an interpretation. Such a result could be justified only if the Constitution were shown to require petitioner's suggested "special circumstances" exception.

But, as discussed earlier, nothing in the Constitution precludes Congress from deciding that the need for preventing litigious interruption of the induction process outweighs the hardship to individual registrants caused by the present scheme of judicial review. None of the cases cited by petitioner supports his position. In *Harmon* v. *Brucker,* 355 U.S. 579, the question was whether the action of the Secretary of the Army was reviewable at any time, in the face of a statute making such action "final." This Court held that it had jurisdiction to determine whether the Secretary had acted in excess of his powers—just as it has held that the federal courts may determine whether a draft board has acted in excess of its powers despite the provision of the Selective Service Act making draft board action "final" (50 U.S.C. App. 460(b)(3); *Estep* v. *United States,* 327 U.S. 114). However, in the instant case the question is not whether draft board action may be reviewed at all, but *when* it may be reviewed; neither *Harmon* nor *Estep* are authority for invalidating a statute ex-

pressly providing that judicial review should take place only after, and not before, certain steps are taken.

In *Leedom* v. *Kyne*, 358 U.S. 184, this Court permitted direct review of the National Labor Relations Board's designation of a collective bargaining unit, where the Board had violated the statute by improperly including professional employees in the unit. The Court held that requiring such employees to defer their challenge to the unit until there had been an election and a refusal to bargain "would mean 'a sacrifice or obliteration of a right which Congress has given professional employees" (358 U.S. at 190). Here, by contrast, postponement of review until after induction—despite the hardship it may entail—does not involve "a sacrifice or obliteration" of the registrant's rights. And here such postponement has been expressly required by Congress for compelling reasons of national policy. Indeed, unlike the statute involved in *Leedom*, here the governing statute expressly forbids the type of review which petitioner seeks.[11]

[11] Similarly, *Miller* v. *Nut Margarine Co.*, 284 U.S. 498, and *Allen* v. *Regents*, 304 U.S. 439, are not pertinent. Those cases held that Section 3224 of the Revised Statutes (now 26 U.S.C. 7421), which prohibits suits to restrain the collection of taxes, incorporated the equity rule established by prior case law. The prior case law had included an exception for "special circumstances," and thus it was held that this exception was incorporated in the statute. Petitioners also cite *Lipke* v. *Lederer*, 259 U.S. 557, which involved Section 3224 as well. However, there it was held that the levy sought to be restrained, although a "tax," was in reality a penalty and thus was not covered by the prohibition in Section 3224 on suits to restrain the collection of taxes. Similarly, *Fay* v. *Noia*, 372 U.S. 391, 434–435, involved

In support of his suggested "special circumstances" exception, petitioner also cites a number of cases which premise the right to declaratory and injunctive relief on Section 10 of the Administrative Procedure Act. *Shaughnessy* v. *Pedreiro*, 349 U.S. 48; *Brownell* v. *Tom We Shung*, 352 U.S. 180; *Rusk* v. *Cort*, 369 U.S. 367. But those cases have no application in the Selective Service context, since the Selective Service Act expressly provides: "All functions performed under this title shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of section 3 of such Act [pertaining to publication of regulations]" (50 U.S.C. App. 463(b)). Moreover, in none of those cases was there a statute expressly forbidding declaratory and injunctive relief.

If the foregoing analysis is correct, then apart from the special problem of petitioner's exempt status as a ministerial student, the district court had no jurisdiction, because of Section 10(b)(3), to reach the merits of the case, and the decisions below should be affirmed. If, however, the Court should conclude that Congress cannot constitutionally bar all pre-induction judicial review,[12] then different views of such jurisdiction are possible: (1) that it is narrowly limited to

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the construction of a statute (28 U.S.C. 2254, which makes federal habeas corpus relief available to state prisoners) intended to incorporate prior case law. By contrast, Section 10(b)(3) was intended by Congress to overrule whatever exception for "special circumstances" may have existed in the prior case law which, in any event, generally prohibited pre-induction review.

[12] Both of the courts below adverted to questions other than the validity of the jurisdictional bar, and this Court's granting of certiorari was not limited to that question.

consideration of First Amendment claims, or (2) that it exists more broadly to determine whether the local board exceeded its authority. Under either view, a consideration of the merits of each case becomes necessary. Accordingly, we turn to the merits of petitioner's claims, realizing of course that, since the courts below did not reach the merits, this Court, should it disagree with those courts on the jurisdictional question, may be disposed simply to remand the case for further consideration.[13]

II. A REGISTRANT WHO FAILS TO COMPLY WITH THE POSSESSION REQUIREMENT IS SUBJECT TO DELINQUENCY RECLASSIFICATION

Petitioner argues that the sole consequence of failure to carry a registration certificate is that it constitutes prima facie evidence of failure to register. That contention is grounded on the statement in the second sentence of the pertinent regulation—32 C.F.R. 1617.1—that a registrant's failure to have his certificate "in his personal possession shall be prima facie evidence of his failure to register." Despite the explicit requirement in the first sentence of the same regulation that a registrant shall have his registration

[13] Petitioner's brief purports to set forth three views regarding the proper scope of pre-induction judicial review: (1) that only First Amendment questions may be raised before induction; (2) that such review may be had in "special circumstances"—*i.e.*, presumably in cases in which the draft board is claimed to have exceeded its powers; and (3) that such review may be had in any case where there is a basis for judicial review, since the statutory preclusion of pre-induction review is wholly unconstitutional. However, as we have shown (see *supra*, pp. 31–34), (2) and (3) are in practical effect identical, since the only ground for judicial relief in any type of proceeding—pre-induction or post-induction—is that the draft board has exceeded its delegated powers.

certificate "in his personal possession at all times," petitioner maintains that, in light of the second sentence, the possession regulation could not have been intended to create a duty for the violation of which a registrant could be subject to delinquency reclassification or criminal prosecution.

Selective Service regulation 1617.1 begins by stating, in clear terms, that every registrant "must * * *have in his personal possession at all times his Registration Certificate * * *" (32 C.F.R. 1617.1). As a matter of ordinary grammar, this language creates a duty, and both the delinquency regulations (32 C.F.R. 1642.4 (a)) and the statutory provision prescribing those violations of the Selective Service Act which are criminally punishable (50 U.S.C. App. 462(a)) cover failure by a registrant to perform any "duty" imposed by the Act or regulations. Petitioner, however, argues that the possession requirements does not create a "duty" on two grounds. First, he points out that one purpose of the possession requirement is to provide a registrant with a convenient means of proving to law enforcement officers that he is duly registered and is not a draft evader. He notes that the regulation itself provides that the failure of any person to have a certificate in his possession shall be prima facie evidence of failure to register (32 C.F.R. 1617.1). Second, petitioner relies on the deletion, in 1942, of a separate sentence of the pertinent regulation to the effect that nonpossession of a certificate constituted an express violation of the regulations (7 Fed. Reg. 9683 (November 23, 1942)).

Of course, one purpose of the registration certifi-

cate is to provide registrants with a ready means of proving their registration. But this is not its only purpose. As this Court stated in *United States* v. *O'Brien*, 391 U.S. 367, registration certificates contain information which "facilitates communication between registrants and local boards," and in addition the certificates contain "continual reminders that the registrant must notify his local board of any change of address, and other specified changes in his status" (*id.* at 379). These purposes—as well as the purpose of providing law enforcement officers with a ready means of ascertaining whether a person has registered—are served by a mandatory requirement of possession.

The fact that the regulation specifies that non-possession shall be prima facie evidence of failure to register does not carry the implication that there is no duty of possession. The creation of the evidentiary presumption obviously required specific language in the regulation; and, as petitioner points out, this language was added in 1941 (6 Fed. Reg. 1796 (March 31, 1941)). But the draftsman may well have concluded that, once the regulation stated that every registrant "must" carry his certificate, it was superfluous to add that failure to comply with this requirement was a violation of the regulation. Thus, the deletion in 1942 of the language stating that non-possession was a violation can probably be explained as merely a drafting change which eliminated superfluous language, rather than having been intended to work a change in the substantive effect of the regula-

tion.[14] Significantly, numerous criminal prosecutions were brought during the years 1943–1945 for failure to possess a registration certificate, an enforcement procedure which would obviously have been unavailable were petitioner's reading of the 1942 change in the regulation's wording correct.[15]

Moreover, many of the Selective Service regulations recognized as imposing duties on registrants do not contain explicit language providing that failure to fulfill the duty is a violation. For example, the regulations prescribe a duty to answer questionnaires (32 C.F.R. 1621.10: "the registrant shall complete and return his Classification Questionnaire"); to advise the local board of changes of status affecting classification (32 C.F.R. 1641.7: "It shall be the duty of every classified registrant to keep his local board currently informed" of changes in status); to notify the local board of changes in mailing address (32 C.F.R. 1641.3: "It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him"); and to report for the Armed

[14] Petitioner quotes (Pet. Br. 89) a Selective Service publication stating that the purpose of the 1942 change was "to delete the language stating that it is a violation of the regulations to refuse to exhibit this certificate * * *." Selective Service Regulations, Second Edition, First Printing 437 (1944). This explanation, however, does not indicate whether the intent of the deletion was to effect a substantive change or rather was only a matter of drafting. Moreover, to the extent that the explanation indicates a substantive change, it refers only to the obligation to exhibit the certificate to law enforcement officers (an obligation not contained in the current regulation), rather than the basic obligation to carry the certificate.

[15] See Selective Service System, Special Monograph No. 4, *Regulation and Selective Service* 109 (1945).

Forces physical examination (32 C.F.R. 1628.16: "it shall be the duty of the registrant to report for such examination [when ordered by his board] at the time and placed fixed"). All these and similar duties are imposed by the regulations without any additional language to the effect that failure to comply would constitute a violation. Certainly the draftsman of the possession regulation could understandably conclude that such additional language was unnecessary.

Petitioner's contention, so far as we can determine, has not been raised in any reported case. It is, however, contrary to the result in *Wills* v. *United States,* 384 F. 2d 943 (C.A. 9), certiorari denied, 392 U.S. 908, sustaining a conviction for failure to submit to induction after a delinquency reclassification based on failure to possess a registration certificate, and in *United States* v. *Kime,* 188 F. 2d 677 (C.A. 7), certiorari denied, 342 U.S. 823, sustaining a conviction for failure to possess a registration certificate. It is also inconsistent with several other cases sustaining convictions for failure to comply with regulatory requirements which did not include an express statement that non-compliance was a violation. *E.g., United States* v. *Wain,* 162 F. 2d 60 (C.A. 2), certiorari denied, 332 U.S. 764 (failure to report termination of employment in war industry which was basis for deferment); *United States* v. *Weiss;* 162 F. 2d 447 (C.A. 2) (same); cf. *United States* v. *Haug,* 150 F. 2d 911 (C.A. 2) (failure to report change of address, where the court held that indictment was proper but that error in instructions required new trial); *Stumpf* v. *Sanford,* 145 F. 2d 270 (C.A. 5), certiorari denied,

324 U.S. 876 (habeas corpus refused in case of conviction for failure to report change of address). Petitioner cites no contrary authority, and the consistent administrative practice similarly refutes his suggestion.

III. THE POSSESSION AND DELINQUENCY REGULATIONS DO NOT VIOLATE THE FIRST AMENDMENT

Petitioner was reclassified as a delinquent under a regulation authorizing such reclassification of any registrant who "has failed to perform any duty or duties required of him under the selective service law * * *" (32 C.F.R. 1642.4(a)).[16] Petitioner's local board found that he violated two requirements: that he maintain in his possession a registration certificate (32 C.F.R. 1617.1), and that he keep the local board informed of his current status (32 C.F.R. 1641.7). Both of these requirements, we submit, impose narrowly-defined duties and in no way, on their face, impinge on petitioner's First Amendment rights.

A. The possession regulation does not violate the First Amendment

Selective Service regulations require registrants to keep their registration certificates in their "personal possession at all times" (32 C.F.R. 1617.1). Petitioner argues that this regulation violates the First Amendment as applied to a person who surrenders his registration certificate as a form of political protest or "symbolic speech." However, the "posses-

[16] "Selective service law" is defined to include the rules and regulations issued under the Act (32 C.F.R. 1602.10).

sion" requirement has been upheld against First Amendment challenge by every court of appeals which, expressly or impliedly, has considered the question. See *United States* v. *Miller*, 367 F. 2d 72 (C.A. 2), certiorari denied, 386 U.S. 911; *United States* v. *Kime*, 488 F. 2d 677 (C.A. 7), certiorari denied, 342 U.S. 823; *Wills* v. *United States*, 384 F. 2d 943 (C.A. 9), certiorari denied, 392 U.S. 908; *O'Brien* v. *United States*, 376 F. 2d 538 (C.A. 1), affirmed on other grounds, 391 U.S. 367. Moreover, the reasoning of this Court in *United States* v. *O'Brien*, 391 U.S. 367, plainly supports the validity under the First Amendment of a regulation designed to insure the continuing availability of registration certificates, for it there stated (*id.* at 377–378.).

> The power of Congress to classify and conscript manpower for military service is "beyond question." * * * Pursuant to this power, Congress may establish a system of registration for individuals liable for training and service, and may require such individuals within reason to cooperate in the registration system. The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.

The legitimate and substantial governmental purposes which this Court referred to in *O'Brien* to sustain legislation forbidding destruction or mutilation of registration certificates (*id.* at 378–380) necessarily

sustain the regulatory requirement of continued possession. There, as here, it was argued that the First Amendment protected "symbolic speech," so that a provision designed to assure "the continuing availability of issued Selective Service certificates" was constitutionally infirm (*id.* at 382). That argument was rejected in *O'Brien;* it is unconvincing here.

It may well be that the Selective Service System could operate without registration certificates, but that is a judgment neither for the courts, as this Court concluded in *O'Brien,* nor for petitioner to make. As delineated in *O'Brien,* these certificates do serve a "legitimate and substantial purpose in the system's administration" (*id.* at 378), and thus their continuing availability may validly be required.[17] Nor does a regulation requiring continued possession deprive registrants of effective means of communicating political protest to the public at large. Protest marches and rallies, conducted wholly in accordance with law, frequently receive extensive newspaper and television coverage.

B. The delinquency regulations are not impermissibly vague

Petitioner contends that the delinquency regulations are impermissibly vague and readily lend them-

[17] Petitioner's suggestion that the information contained in registration certificates is in any event continuingly available to the government because of the existence of Selective Service System files, of course, pertains to the situation involved in *O'Brien* as well. Moreover, the notion that surrendered certificates remain available since in governmental possession ignores the point that possession *by the registrant* is what both the regulations, and the Court's discussion in *O'Brien*, plainly contemplate.

selves to an interpretation resulting in the denial of First Amendment rights. These regulations, as noted, authorize reclassification of a registrant who "has failed to perform any duty or duties required of him under the selective service law * * * " (32 C.F.R. 1642.4(a)). This language thus simply incorporates the provisions of the Selective Service Act and regulations imposing certain duties on registrants, and petitioner has not shown that any of these provisions are impermissibly vague or overbroad. In particular, the duties involved in this case—the duty to carry a registration certificate at all times (32 C.F.R. 1617.1) and the duty to keep the local board informed of the registrant's status (32 C.F.R. 1641.7)—are specific and narrowly defined.

In arguing that the delinquency regulations are susceptible of an interpretation denying First Amendment rights, petitioner points to certain statements in a letter dated October 26, 1967, written by General Hershey, Director of Selective Service, to the Selective Service System generally (Pet. Br. App. 1a). If those statements are interpreted as authorizing local boards to reclassify registrants on the basis of any conduct deemed by the board to be contrary to the national interest, including acts of political protest, then serious constitutional problems would result. If the Director of Selective Service has interpreted the delinquency regulations too broadly, the proper response is to correct his interpretation rather than to invalidate the regulations themselves.

The meaning and likely effect of the Director's letter may nonetheless be relevant in determining wheth-

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er the delinquency regulations may validly be applied in circumstances like those involved here.[18] We now turn to that issue.

IV. IT IS QUESTIONABLE WHETHER THE DELINQUENCY RECLASSIFICATION OF PETITIONER WAS AUTHORIZED BY THE STATUTE, AND WHETHER IT WAS CONSTITUTIONALLY VALID

Preliminarily, we note that the remaining contentions relating to the merits of the case are not grounded on the First Amendment. Thus, they would be reached only under an approach to pre-induction judicial review which permits any question concerning a draft board's compliance with the Constitution, the Selective Service Act, or the Selective Service regulations to be reached in a pre-induction suit, contrary to the express terms of Section 10(b)(3). But the contentions are made at length by petitioner, and the Court's grant of certiorari was not limited to the jurisdictional question. Moreover, since at least one of the contentions poses a serious and important issue, we think it appropriate to attempt to provide a thorough response.

[18] We are aware of only four instances where local boards may have interpreted General Hershey's letter to authorize reclassification of registrants on the basis of activities unrelated to their duties as registrants. In three of these cases—*Huey*, *Peffers and Hess*, and *Ratliff* (see Pet. Br. 17–18, n. 8, 74–75)—the reclassification was reversed administratively. The fourth case—*Connell* (see Pet. Br. 18, n. 8)—is presently before the New York State Appeal Board, and we are advised that the State Director of Selective Service has requested the appeal board to restore Connell's prior classification. Apart from these instances, the cases cited by petitioner all involve registrants found to have violated a specific provision of the Selective Service law or regulations. Most of these cases, like the present one, involve non-possession of draft cards.

In attacking the delinquency regulations, the burden of petitioner's argument rests on his characterization of his reclassification as "punitive." This characterization is in some respects misleading. The delinquency regulations can be viewed as an administrative means of ensuring that the registrant complies with the duties, statutory and otherwise, which he owes to his local board and the Selective Service System. Pursuant to the regulations, any registrant who "has failed to perform any duty" required of him under the Selective Service Act and regulations may be declared a delinquent and placed by reclassification in the highest priority for induction (32 C.F.R. 1642.4 (a), 1631.7(a)). In this manner, the registrant who seeks to avoid the draft finds, instead, that his induction might be accelerated because of his interference with the system's orderly functioning.

Since the regulations seek to render self-defeating any attempt by the registrant to cut himself off from contact with the Selective Service System, it might be said that they are basically remedial rather than punitive in nature. Indeed, at least one of the purposes of delinquency reclassification is to bring registrants back into compliance with their duties and thus enable the Selective Service System to operate effectively, rather than to punish registrants for past violations. Until the moment of induction, a reclassified registrant has the opportunity, albeit not the right, to have his delinquency status changed if he corrects his default. His local board may, in its discretion, restore a delinquent registrant to his prior classification without the restrictions

against reopening classifications which would otherwise be applicable (32 C.F.R. 1642.4(c), 1642.14).[19] Accordingly, the delinquency regulations might be viewed as a remedial sanction, since they are a means whereby the Selective Service System can compel registrants to perform their duties under the pertinent laws and regulations.

Petitioner apparently does not contest this characterization of the delinquency regulations, and would seemingly not quarrel with their application to the case of an individual who failed to register or failed to notify his board of his whereabouts. Petitioner argues, however, that the regulations should be interpreted as applying only to duties pertaining to the classification and induction process. Only such an interpretation, petitioner contends, can be squared with the Constitution and the Selective Service Act. Reclassification on the basis of actions of a registrant which do not pertain to the classification and induction process, petitioner asserts, would constitute the administrative imposition of punishment without constitutional safeguards such as trial by jury—a result authorized neither by the Act nor the Constitution.

Perhaps there is no occasion here for determining whether the delinquency regulations might in some circumstances be enforced so as to result in an impermissible "punitive reclassification." Petitioner's assertion that the registrant's duty to carry his draft card does not pertain to the classification and induction

[19] There are numerous cases where registrants, who had been declared delinquent after turning in their registration certificates or notices of classification, had their prior deferments restored after requesting their local draft board to reissue the surrendered certificate.

process is at least a dubious one. Registration is a necessary, preliminary step to classification and induction. As the Court stated in *United States* v. *O'Brien*, 391 U.S. 367, 377, individuals may be required "within reason to cooperate in the registration system." Not only is "[t]he issuance of certificates indicating the registration and eligibility classification of individuals * * * a legitimate and substantial adminstrative aid in the functioning of this system "(*ibid.*), but, the Court further concluded, "the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration" (*id.* at 378).

The requirement of personal possession of registration certificates is thus calculated to make the entire system operate more effectively. The possession regulation aids the administration of the registration system by assuring the continuing availability of issued registration certificates. Most of the purposes served by those certificates, as delineated by the Court in *O'Brien* (*id.* at 378–380), "would be defeated" no less by their continued non-possession by registrants than by "the certificates' destruction or mutilation" (*id.* at 378). Thus, it might be concluded that the possession regulation is closely related to the classification and induction process, and is an appropriate subject for enforcement through the remedial administrative mechanism of the delinquency regulations.

However, petitioner's attack on the delinquency regulations is not limited to his contention that the failure to carry a registration certificate is not properly enforceable thereunder. He maintains, more

broadly, that the delinquency regulations are not authorized by the Selective Service Act, and, in any event, cannot constitutionally be invoked to punish political protest directed against governmental policy. These are serious and substantial claims, and cannot be brushed aside lightly.

In evaluating petitioner's challenge to the delinquency regulations in these respects, some background is helpful. The delinquency regulations have been in effect, in substantially their present form, since enactment of the revised Selective Service law in 1948.[20] Indeed, the present regulations are similar to the delinquency regulations in effect during World War II.[21] During this lengthy period, Congress was presumably aware of these regulations, but did not see fit to rescind or change them. Moreover, when the Selective Service Act was extensively amended in 1967, the congressional committee reports explicitly recognized the existence of the delinquency regulations (S. Rep. No. 209, 90th Cong., 1st Sess. 3, 6; H. Rep. No. 267, 90th Cong., 1st Sess. 17). Indeed, Congress, in enacting the 1967 amendments, not only failed to modify or weaken the delinquency regulations, but instead inserted a provision in the statute which, for the first time, gives express recognition to

[20] Selective Service System Regulations, Sections 631.7, 642.13; 13 Fed. Reg. 5479, 5483 (September 21, 1948).

[21] Selective Service System Regulations, Section 601.5; 6 Fed. Reg. 6825 (December 31, 1941); Selective Service System Regulations, Sections 642.1, 642.12, 642.13; 8 Fed. Reg. 14116 (October 19, 1943).

their existence.[22] Thus, these regulations might be viewed as a recognized and long-established feature of the Selective Service System, which Congress, implicitly and now explicitly, has authorized and approved.

However, neither the antiquity of the delinquency procedure nor the apparent congressional sanction which the regulations have received precludes an inquiry into whether the manner of their application in particular cases is consistent with the Act and the Constitution. If the essential purpose actually underlying delinquency reclassification is to punish registrants for their failure to comply with their duties under the Selective Service law and regulations, a serious constitutional question is raised, since none of the required constitutional safeguards traditionally associated with criminal punishment are provided.

As petitioner points out, the leading case on this point is *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144. There, however, the Court noted that one test of whether a sanction is penal in nature is "'whether it has historically been regarded as a punishment'" (*id.* at 168). Service in the Armed Forces of this country has traditionally been considered a privilege, or at least an accepted duty of citizenship, and not

[22] That provision—Section 6(h) of Public Law 90-40, amending 50 U.S.C. App. 456(h)—refers in terms only to the priority induction status of delinquents—a basic feature of the regulations. In using the term "prime age group" in connection with student deferments, the section defines that term to mean "the age group from which selections for induction into the Armed Forces are first to be made *after delinquents* and volunteers" (emphasis added).

a criminal punishment. Persons with military records have traditionally pointed to their service with pride, and military service normally entitles an individual to a variety of veterans' benefits under both state and federal law. This is in striking contrast to the effect of the "record" of an ex-convict. Any burdens and hardships involved in military service have generally been regarded as conferring honor and credit on a man, rather than the stigma associated with criminal punishment. Thus, the fact that military service involves a certain amount of physical restraint[23] does not necessarily mean that induction following delinquency reclassification constitutes a penal sanction.

On the other hand, where a draft board utilizes delinquency reclassification to seek retribution against an individual for some activity he has engaged in, wholly unrelated to his duties as a registrant, then it could well be concluded that the board had in effect utilized reclassification and induction as a form of punishment, contrary to its traditional purpose and despite the nature of military service as a general matter. In essence, this is what happened in *Wolff* v. *Selective Service Local Board No. 16,* 372 F. 2d 817 (C.A. 2). In that case registrants were reclassified for protest activity which was not directly related to any duties pertaining to their own registration or classification. There the court of appeals noted that "no regulation authorizes a draft board to declare a reg-

[23] It is an accepted proposition that habeas corpus lies to secure release from the Armed Forces in appropriate circumstances. *E.g., Eagles* v. *United States ex rel. Samuels,* 329 U.S. 304.

istrant a delinquent or to reclassify him for such action" (*id.* at 821), and concluded that "it is not the function of local boards in the Selective Service System to punish * * * registrants by reclassifying them I–A because they protested * * * the Government's involvement in Vietnam" (*id.* at 822). That is a conclusion from which it is extremely difficult, if not impossible, to dissent.

But the situation here might be viewed as differing significantly from *Wolff*. In that case it could not be said that the reclassification was remedial—designed to enforce duties owed by the registrants to their local boards. Rather, it was obviously penal—directed simply toward punishing the registrants for their protest activity, *i.e.*, "sitting in" at a local board. Here, by contrast, petitioner violated specific, continuing, and affirmative duties imposed on him by the regulations and which he owed to his local board. Moreover, unlike the registrants in *Wolff*, petitioner could have sought to correct his violations at any time, subject to the board's discretion as to whether it would restore his prior classification.[24] Accordingly, *Wolff* is

[24] This consideration answers petitioner's contention that his reclassification violated the procedure the regulations (32 C.F.R. 1642.4, 1642.10) prescribe, because there was no interval between the notice of delinquency and the notice of classification sent to him by his local board. Although the regulations do not specify that there must be such an interval, presumably some period should elapse. But the only purpose of such interval would have been to enable petitioner to cure his violations by requesting issuance of a new registration certificate and informing the board of his current status. Although petitioner had ample opportunity to correct his status during the six-week period between the mailing of his notice of classification on November

not dispositive, and petitioner's delinquency reclassification may be viewed as remedial and not penal since designed simply to bring him back into compliance with his duties as a registrant.

Nonetheless, that conclusion may be too simplistic, especially in view of the disquieting circumstances which surround the delinquency reclassification of petitioner and others who, like him, have violated their duties as registrants by engaging in protest activity. In evaluating the purpose toward which the delinquency reclassification of such registrants has been directed, the views expressed by General Hershey in his letter of October 26, 1967, cannot be treated as irrelevant. That letter, in effect, called upon local boards to apply the delinquency reclassification procedure to "misguided registrants" who engage in "illegal activity" in "violation of the act or regulations" (Pet. Br. App. 1a). It is difficult to conclude that these statements did not in effect invite local boards to utilize delinquency reclassification in a punitive fashion. Despite their autonomy in such matters, it might be expected that the local boards would act upon such an invitation. The considerable number of cases in recent months involving delinquency reclassifications confirms that local boards have in fact so proceeded. Against this background, a serious question is posed whether the delinquency

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7, 1967, and his induction order of December 27, 1967 (A. 4), he makes no allegation that he sought to do so. While petitioner pursued and exhausted his administrative remedies during this period, his approach throughout was to challenge the legality of his reclassification (A. 4, 8), and there is no allegation that he ever attempted to correct his status.

regulations are being applied in a manner consistent with the Selective Service Act and the Constitution.

Congress' purpose in enacting what is now called the Military Selective Service Act was to provide "an adequate armed strength" so as to ensure the security of the country (50 U.S.C. App. 451(b)), "in accordance with a system of selection which is fair and just" (50 U.S.C. App. 451(c)). Congress accordingly established a Selective Service System, and prescribed a registration and classification process directed toward the accomplishment of its basic objective. Certain classes of individuals, for a variety of policy and other reasons, have been given exemptions and deferments from involuntary military service (50 U.S.C. App. 456, as amended by Public Law 90–40). One section of the statute relates specifically to the manner of selecting men for training and service, and provides that such selection "shall be in an impartial manner" (50 U.S.C. App. 455, as amended by Public Law 90–40). Congress further prescribed criminal penalties for those who knowingly fail to perform any duties required of them as registrants under the Act or Selective Service regulations (50 U.S.C. App. 462). Considering this legislative background, it is at least questionable whether Congress intended to sanction an administrative procedure which can result in the compelled induction of those registrants who in any manner fail to comply with any of the duties prescribed by the Selective Service regulations, regardless of their status under the Act.

It may be assumed that Congress has now approved of and authorized some sort of delinquency procedure.

But that does not resolve the question whether that procedure can be applied, consistent with the underlying congressional intent, in all situations involving violations of the Act of the regulations. Some of the duties imposed on registrants bear a rather direct relationship to their status as draft-eligible citizens, such as the requirement to register and to keep the local board informed of one's location and educational situation. Other duties have no such nexus, or an attenuated one at best. Yet the delinquency regulations are by their terms applicable to any registrant who fails to perform "any duty or duties required of him under the selective service law," except the duty to report for induction when so ordered (32 C.F.R. 1642.4(a)).

It is difficult to believe that Congress intended the local boards to have the unfettered discretion to decide that any violation of the Act or regulations warrants a declaration of delinquency, reclassification and induction, regardless of its relationship to the individual's status as exempt or deferred or whatever. Congress prescribed criminal prosecution for such violations, and also provided for exemptions and deferments for certain classes of individuals to reflect considerations of national interest apart from simply raising manpower for the Army. Termination of such status through delinquency reclassification may effectively undermine that congressional determination and thus be inconsistent with the Selective Service Act.

In addition, although the regulations authorize the restoration of individuals to their prior classification if they remedy their delinquency, that decision is left

wholly to the discretion of the local boards (32 C.F.R. 1642.4(c), 1642.14). The analogy to civil contempt is thus incomplete; a court has no authority to continue the subjection of an individual to sanctions once his compliance has been secured. Thus, it may similarly be doubted that Congress intended the local boards to have such complete authority in revoking delinquency reclassifications. It is no answer to say that Congress must have so intended, because it sought to shield board decisions from pre-induction judicial review by enacting Section 10(b)(3). To the contrary, that consideration may well support the view that Congress intended the boards to exercise their authority in a circumspect and cautious fashion, since, to the extent that section is applicable, their decisions would be reviewable only after induction or refusal to submit thereto, and then only in terms of whether a "basis in fact" existed for the reclassification.

Whether delinquency reclassification accords with the Act thus presents a serious and difficult question. We note that District Judge Dooling recently set forth persuasively the reasons for a negative answer in a presently unreported opinion in *United States* v. *Eisdorfer*, No. 67 Cr. 302, decided June 24, 1968 (E.D.N.Y.). While we do not necessarily agree with all of his statements, it may be helpful to the Court to quote the pertinent passages from that well-considered opinion. As a matter of convenience, those passages are reprinted in Appendix A (*infra*, pp. 75-77).

Apart from whether delinquency reclassification, at least as applied in circumstances like those involved

here, is consistent with the congressional intent in enacting the Selective Service Act, constitutional problems may be presented as well. In the first place, if the delinquency regulations are regarded as having congressional authorization, it may be questioned whether the delegation of power to the Selective Service boards, without standards for the exercise of the sweeping discretion given them by the regulations,[25] comports with the Constitution. *E.g., Zemel* v. *Rusk,* 381 U.S. 1, 17–18; *Greene* v. *McElroy,* 360 U.S. 474, 507–508. Moreover, the absence of any specified nexus or reasonable relationship between the violation which triggers reclassification and induction, and the registrant's status *vis-à-vis* the Selective Service System, might be viewed as inconsistent with due process notions. Cf. *Perez* v. *Brownell,* 356 U.S. 44, 58; *Tot* v. *United States,* 319 U.S. 463, 467. And, most importantly, it is at least questionable whether the rationale of *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, can be distinguished simply by maintaining that military service, unlike expatriation, has not been traditionally viewed as punitive in nature (see *supra,* pp. 49–50).

In reciting "the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character," the Court in *Mendoza-Martinez*

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[25] Moreover, this Court has repeatedly referred to and applied the proposition that delegations of congressional authority to administrative agencies should be narrowly construed where necessary to avoid any constitutional questions which might otherwise be presented. *E.g., Kent* v. *Dulles,* 357 U.S. 116, 129; *United States* v. *Rumely,* 345 U.S. 41, 46–47; see also *United States* v. *Robel,* 389 U.S. 258, 272–282 (Brennan, J., concurring).

referred not only to whether the sanction "has historically been regarded as a punishment" (372 U.S. at 168), but also to a number of other considerations, most of which might be viewed as supporting the conclusion that delinquency reclassification, especially in light of General Hershey's letter and the manner of that procedure's application in this and similar cases, does constitute criminal punishment. Indeed, the appropriate question may well be not whether military service as such constitutes punishment, but whether the subjection of a registrant to the entire process of delinquency, reclassification and induction amounts, in the present circumstances, to the imposition of a penal sanction. As petitioner points out, it can hardly be gainsaid that the subjection of an individual to this process produces "an affirmative disability or restraint" (*id.* at 168), promotes "the traditional aims of punishment—retribution and deterrence" (*ibid.*), and involves the application of a sanction to "behavior * * * which * * * is already a crime" (*ibid.*). Thus, a sound argument can be made that, under the criteria spelled out in *Mendoza-Martinez*, application of the delinquency and reclassification procedure to registrants like petitioner, in view of the surrounding circumstances, actually results in the imposition of punishment without the constitutional safeguards prescribed for criminal cases, particularly under the Fifth and Sixth Amendments.

What conclusion should be reached, in view of the competing considerations regarding the general validity of delinquency reclassification, is not an easy question. Should the Court accept the position taken

below that that procedure is unauthorized, at least with respect to individuals like petitioner who have been given an express statutory exemption from military training and service (*infra*, pp. 58–66), it is unnecessary to reach the general question in the instant case. Assuming the validity of that position, however, it tends to confirm the view that delinquency reclassification, at least as regards the broad scope given that procedure under the regulations, is inconsistent with the Act and probably unconstitutional as well.

V. PRE-INDUCTION JUDICIAL REVIEW OF PETITIONER'S RECLASSIFICATION SHOULD BE PERMITTED IN ORDER TO RECONCILE SECTION 10(b)(3) OF THE SELECTIVE SERVICE ACT WITH THE CONGRESSIONAL DETERMINATION IN THE SAME STATUTE THAT A MINISTERIAL STUDENT "SHALL BE EXEMPT FROM TRAINING AND SERVICE" UNDER THAT ACT

In addition to the general problems already discussed, the present case presents a further specific question.

In his complaint before the district court, petitioner alleged that he is "a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full time course of instruction in a recognized theological or divinity school" (A. 3). The accuracy of this allegation is admitted, for the purposes of the present proceeding, by the government's motion to dismiss (A. 12).

Congress has provided in Section 6(g) of the Selective Service Act (50 U.S.C. App. 456(g)) that such

a student "shall be exempt from training and service" under the Act. This case thus presents the question of the interrelation of this express statutory exemption with the procedural provision in Section 10(b)(3) which bars pre-induction judicial review of Selective Service classifications.[26]

The complaint alleged (A. 4) that petitioner was classified as IV–D, which is the classification for ministerial students, that, following his turning in his draft card, he was declared a delinquent and on the same day was reclassified as I–A, that he appealed from this reclassification, and thereafter received an order to report for induction. It was at this point that he brought the present proceeding.

We have here two explicit statutes, neither of which contains any qualification or exception. One provides that ministerial students shall be exempt. The other provides that "no judicial review shall be made of the classification or processing of any registrant * * * except as a defense to a criminal prosecution." Both provisions are part of the same statute—the Selective Service Act—though enacted at different times. It cannot be said that the two statutory provisions are necessarily or inherently inconsistent. But there are serious problems of construction.

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[26] According to the complaint (A. 4), the delinquency notice advised petitioner that he was also declared a delinquent because of "failure to provide the local board [with notice] of his current status." This apparently related to petitioner's continuing status as a student enrolled in a recognized divinity school, although this is not substantiated by the record. Such a failure was, however, denied in the complaint (A. 4).

1. In the first place, despite the sweeping language of Section 10(b)(3)—"[n]o judicial review shall be made of the classification or processing of any registrant * * * except as a defense to a criminal prosecution * * * after the registrant has responded either affirmatively or negatively to an order to report for induction"—this provision *is* subject to an exception or qualification in that review may be had, after induction, not only through a criminal prosecution but also by habeas corpus. This is surely a means of "judicial review" other than by "criminal prosecution." The exception is justified in part because of the legislative history of the statute, and in part because of the word "affirmatively" in the statute itself, which has little or no meaning in relation to a criminal prosecution. The basic reason for this construction, however, must be constitutional. Article I, Section 9, Clause 2 of the Constitution provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended," with an exception which is not relevant here. In order to avoid the constitutional problem that would arise if the statute were construed to bar habeas corpus, it is accepted that the statute does not preclude such review despite the fact that no such qualification is stated in the sweeping language of the statute. See *Estep* v. *United States*, 327 U.S. 114, 123–125.

Are there other qualifications which are necessary for a sound construction of these statutory provisions?

2. The two paragraphs involved here are not verbally inconsistent. It is *possible* to have review only

through criminal prosecution, or through habeas corpus, and to have the ministerial exemption recognized at that point. But there are difficulties. After a draft board issues a notice of induction, a registrant is surely in peril if he refuses to comply with it, and he may find himself effectively in service, if he does comply with it. It might be claimed that he had waived his exemption by responding affirmatively to induction, and he may be held not to have exhausted his administrative remedies if he refuses to accept induction. See *Falbo* v. *United States*, 320 U.S. 549, 553. Moreover, he does not have an opportunity to find out in advance whether he is wrong, and to decide then whether to take the penalty or to accept the legal conclusion as to his status. He must take the risk in order to find out whether he is subject to a penalty.

All this may be within the power of Congress. The question remains how the statutory provisions, each, unqualified in terms, should be fitted together as a matter of statutory construction, to make a coherent statutory scheme.

3. The issuance of an order to report for induction is surely a restraint on the freedom of movement of the person who receives it. It requires him to be at a certain place at a certain time, or else suffer criminal penalties. It has been held that the writ of habeas corpus is available to review the propriety of such an order. *Ex parte Fabiani*, 105 F. Supp. 139 (E.D.Pa.) (McGranery, J.), cited by this Court in *Jones* v. *Cunningham*, 371 U.S. 236, 240. The *Fabiani* decision was disapproved in *Lynch* v. *Hershey*, 208 F. 2d 523 (C.A.

D.C.), certiorari denied, 347 U.S. 917. But it may be supported by more recent extensions of the scope of the writ of habeas corpus. *Jones* v. *Cunningham, supra* (parole); *Walker* v. *North Carolina,* 262 F. Supp. 102 (W.D.N.C.) (suspended sentence), affirmed on other grounds, 372 F. 2d 129 (C.A. 4), certiorari denied, 388 U.S. 917. See also *Carafas* v. *LaVallee,* 391 U.S. 234, 237. If the writ of habeas corpus is available in such cases, then the denial of judicial review before refusing or accepting induction may amount to a suspension of the writ. We do not urge that such is the case, but think the problem is a relevant consideration in determining how these two unqualified statutory provisions should be construed.

4. There is clearly a First Amendment element in this case. The complaint alleges that the petitioner turned in his draft card "for the sole purpose of expressing dissent" (A. 3).

There are also questions under the Fifth and Sixth Amendments. The petitioner was declared a delinquent without a hearing, and was reclassified I-A on the same day, also without a hearing. The consequence was the order to report for induction. Although this may not be "punishment" for crime in the constitutional sense, the argument that it was a governmental sanction, involving loss of liberty, imposed because of violations of regulations, is not wholly specious. To the extent that this argument has substance, it raises questions with respect to the need for "indictment of a Grand Jury," under the Fifth Amendment, and with respect to the right to trial by jury, and to counsel under the Sixth Amendment.

Many of the foregoing considerations would be applicable to any registrant who was reclassified on delinquency grounds. There is the further element in this case that petitioner falls in a class to whom Congress has granted an explicit exemption "from training and service" under the Selective Service Act. The grant of exemption to ministers is deepseated in our history and tradition. It clearly has First Amendment overtones. A necessary corollary of that exemption, and equally traditional, is the exemption granted to students for the ministry. Despite the sweeping language of Section 10(b)(3) of the Selective Service Act, added in 1967, there is no reason to believe that Congress actually intended to repeal the exemption expressly granted to ministers and ministerial students to permit reclassification because of a violation of a regulation, of possibly doubtful meaning and effect, and not of one of the provisions of the statutes enacted by Congress itself. In such a case, the two statutory provisions should be construed so as to give as much effect as possible to each of them. The situation here is in some ways similar to that in *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 488–489, where this Court said:

> We are dealing with hasty legislation which Congress did not stop to perfect as an integrated whole. Our task is to give all of it—1917 to 1941—the most harmonious, comprehensive meaning possible. * * * To do otherwise would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.

Of course, it is possible to say that the effect of Section 10(b)(3), even in the face of Section 6(g), is that petitioner should have waited until the time fixed for his induction, should then have refused to submit to induction, and should, finally, have raised his defense in a criminal prosecution. However, in view of the explicit exemption granted by Section 6(g), the Attorney General would not have started such a prosecution, and if he did, it would have been the clear duty of the court to have dismissed the prosecution on a showing that petitioner comes within the exempted class. In such a situation, it can hardly be a proper construction of the statutory provisions which "requires the courts to march up the hill when it is apparent from the beginning that they will have to march down again" (*Estep* v. *United States*, 327 U.S. 114, 125).

Courts have long been confronted with the problem of construing and applying statutory provisions which, because of their sweeping terms, their overlap, or otherwise, are superficially inconsistent. The settled practice is to interpret them so as to do the least violence to each of them, while at the same time best effectuating the overall design of the statute. *Williams* v. *Pritchard*, 4 Term Rep. 2; *Peck* v. *Jenness*, 7 How. 612, 623;[27] *New Lamp Chimney Co.* v. *Anaonia Brass and Copper Co.*, 91 U.S. 656, 663; *United States* v.

[27] In *Peck* the Court stated: "One portion of a statute should not be construed to annul or destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together."

Moore, 95 U.S. 760, 763.[28] See also *Spies* v. *United States*, 317 U.S. 492; *Achilli* v. *United States*, 353 U.S. 373; *Sansone* v. *United States*, 380 U.S. 343.

The construction of Section 10(b)(3) here urged need, as far as this case is concerned, extend only to those classes of persons who have been expressly granted an exemption from training and service by the act of Congress. Although the statutory terminology differs, and not all are phrased as "exemptions," these would appear to include no others, in addition to ministers and ministerial students, than persons under 19 years of age (50 U.S.C. App. 454, 455), veterans of military service (50 U.S.C. App. 456(b)), members of the National Guard and reserves (50 U.S.C. App. 456(c)), and sole surviving sons (50 U.S.C. App. 456(o)). The argument need not extend to persons who are deferred, such as students, because they remain liable for service and training, with only the time of service subject to adjustment. The situation of conscientious objectors is uncertain (see 50 U.S.C. App. 456(j)). The question of the validity of a claim to conscientious objector status may be one of great difficulty and cannot be as readily determined on an objective basis, as the other grounds for exemption. The determination of such status involves more of the process of "classification" that Congress has committed to the discretion of the local boards. It is also a situation where the disruption of the orderly process of obtaining military manpower would

[28] In *Moore* the Court stated: "In cases like this, the construction should be such that both provisions, if possible, may stand."

be greater than in the case of the clear and direct exemptions specifically granted by Congress. Moreover, it would rarely be presented in conjunction with the problem of the applicability of the delinquency regulations, which is involved here. However, none of these questions need be determined in this case.

It is enough here to conclude that the statutory provisions involved can best be reconciled by permitting petitioner to maintain a pre-induction suit challenging his delinquency reclassification, in view of the whole complex of factors here, taken together, including (a) the constitutional doubts which might be raised on these particular facts, including the applicability of the delinquency regulations, and (b) the clear exemption specifically granted by Congress, without qualification, to ministerial students. Since, on the basis of this analysis, the local board lacked the authority in the face of an express statutory exemption to reclassify petitioner and order him inducted, the judgment below should be reversed and the cause remanded with directions to hold a hearing at which the petitioner would be given the opportunity to prove the facts alleged in his complaint, including the jurisdictional amount required by 28 U.S.C. 1331, and, if these facts are found to exist, to enter a decree in favor of the petitioner.

The agency charged with the administration of the statute involved here, the Selective Service System, does not agree with the arguments which have just been presented. In order that the Court may have the

benefit of its responsibly held views with respect to the construction and application of the Act, the legal position supported by the Selective Service System is stated in the remaining portion of this brief.[29]

The Selective Service System maintains that, in light of Section 10(b)(3), the merits of petitioner's classification may not be reached in this suit, and that, in any event, delinquency reclassification may be applied to ministers and ministerial students as well as to other registrants. Thus, the Selective Service System contends that the judgment below should be affirmed.

In the view of the Selective Service System, the language of Section 10(b)(3) which forbids "judicial review * * * of the classification or processing of any registrant by local boards" prior to induction is clear and unambiguous. There is thus no basis to read an exception into the statute. Neither is there any reason to distinguish, for purposes of permitting pre-induction suits, between violation of the statute itself and violation of the regulations.

Nor, in the view of the Selective Service System, does a local board have authority under the Selective Service Act to act contrary to the Constitution (cf. *Greene* v. *McElroy*, 360 U.S. 474). Surely a registrant alleging a constitutional violation would be entitled to at least the same degree of procedural protection as

[29] This statement of the position of the Selective Service System is based upon a memorandum prepared by counsel for the Director of the Selective Service System, which was lodged with this Court in April 1968. It has been submitted to counsel for the System and the changes requested have been made.

a registrant alleging that his board had acted contrary to the statutory exemption for ministerial students. Thus, the Selective Service System feels that an exception to Section 10(b)(3) cannot be confined to the limited factual situation presented here. If ministers and ministerial students can obtain pre-induction judicial review, this procedural protection cannot consistently be denied to any registrant claiming that his local board has violated the Constitution, the Selective Service Act, or the Selective Service regulations.[30]

The System would have no objection to making pre-induction suits available to all registrants, if Congress had so provided and if it were possible for a court to determine, promptly on the filing of an action, whether a registrant's rights under the Constitution or the Selective Service Act or regulations have been violated. But the practicality of the situation is that it is not possible for a court to determine promptly whether the registrant's rights have in fact been violated. Pre-induction suits are generally filed within a few days of the induction date. All involve allegations that constitutional, statutory, or regulatory violations of the registrant's rights have occurred. Many such

[30] Even if the exception to Section 10(b)(3) were confined to registrants claiming express statutory exemptions, the System believes that a large number of registrants would bring pre-induction suits. Thus, a question would arise with respect to conscientious objectors (50 U.S.C. App. 456(j)). Similarly, college students are entitled by statute to a deferment (50 U.S.C. App. 456(h)), and, while the granting of the deferment is subject to administrative rules and regulations, the registrant's entitlement to a continuation of a deferment until he graduates (or reaches age 24), is unconditional.

suits involve either questions of law that are unclear, or questions of fact that are complex. In these circumstances, a district judge would be virtually compelled to grant interim relief if he has jurisdiction, for otherwise the case would become moot on the registrant's induction. Thus, the induction process would be subject to the "litigious interruptions" which Congress determined should not be allowed.[31]

In light of the express congressional purpose in enacting Section 10(b)(3), it is the System's view that there is no room for an exception in cases where it is alleged that the board has clearly exceeded its statutory or constitutional authority;[32] such allegations frequently involve questions that take much time to litigate.

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[31] The prospect for such "litigious interruptions" is magnified when it is realized that many young men are quite understandably anxious at least to delay their induction. Anyone who seeks delay, and who knows that the filing of an action will in all likelihood lead to a deferral of his induction through the grant of interim relief, may be expected to bring a pre-induction suit, even though he does not expect to prevail on the merits. Accordingly, such "litigious interruptions" of the induction process can be expected on a large scale. And while those who are willing to use the judicial process for purposes of delay would obtain postponements of induction, other young men who do not have access to lawyers, or are less well-informed regarding the possibilities of judicial delay, or do not wish to utilize such delaying tactics, will be inducted in their place.

[32] Moreover, Section 10(b)(3) itself was passed in response to the Second Circuit's decision in *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817—a case in which the court of appeals concluded that the local board had acted clearly beyond its statutory authority (see H. Rep. No. 267, 90th Cong., 1st Sess. 30–31). Congress thus intended to preclude pre-induction judicial review in cases where authority was

The Selective Service System is not unconcerned with the heavy burden placed on registrants whose rights have been violated if they are required to complete the induction process before they can vindicate these rights in court.[33] But it is also concerned with the delays in the induction process that will take place if courts have jurisdiction to stay induction orders pending determination of whether a registrant's rights have been violated. Section 10(b)(3) represents a congressional judgment that the burden should be imposed on those few registrants whose rights are in fact violated by their induction orders, in order to avoid the "litigious interruptions" to the induction process that would be occasioned by pre-induction review in the much greater number of cases in which

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exceeded or usurped by local boards, not simply misapplied or abused. Indeed, alleged usurpation of delegated authority is the only ground on which draft board action may be reviewed in criminal prosecutions or habeas corpus actions (*Estep* v. *United States*, 327 U.S. 114, 119–123).

[33] As a practical matter, the burden placed on the registrant is heaviest when his rights are *not* clear, since in such a case he is taking the greatest risk by completing the induction process. Where, on the other hand, the registrant's rights have plainly been violated, he runs very little risk by refusing to submit to induction and awaiting prosecution, or by submitting to induction and immediately bringing a habeas corpus action. Thus, for example, petitioner here runs very little risk, even though he cannot obtain pre-induction judicial review, if it is in fact clear that his right to a statutory exemption was violated. In such event, the Department of Justice would not prosecute if he refuses to be inducted, and would promptly confess error if he submits to induction and brings a habeas corpus action. Thus, the suggested exception to Section 10(b)(3), if it is in practice confined only to those registrants whose rights have been "clearly" violated, will aid only those registrants whose risk in completing the induction process is minimal, and will not serve to assist those who run a substantial risk in so doing.

no rights have been violated but in which registrants nevertheless bring suit. The congressional judgment in this respect is applicable to the instant situation, is, in the view of the Selective Service System, consistent with the Constitution, and must be followed by the courts.

The Selective Service System also contends that the delinquency regulations can be applied to a registrant even though he is otherwise entitled to a statutory exemption. The present delinquency regulations have been in effect since 1948, and similar regulations were in effect during World War II. Congress has been aware of these regulations, and in Section 6(h) of the 1967 amendments (50 U.S.C. App. 456(h), as amended), expressly recognized and authorized the key element of the delinquency procedure—*i.e.*, the priority induction status of delinquents. Thus, the System contends that the delinquency regulations are not merely administrative and can affect statutory rights. These regulations are a recognized and long established feature of the Selective Service System. Accordingly, when Congress conferred exemptions and deferments in the Selective Service Act, it did so, the System feels, in the context of these regulations.

Moreover, the System believes that a reading that the statutory exemptions and deferments are subject to the delinquency regulations is in accord with the purposes of the Act. Section 6(g), while granting ministerial students exemption from military service, states explicitly that such students are *not* exempt from registration. As registrants, they owe a number of

duties to their local boards, including the duty of carrying their registration certificates and keeping their local boards informed of their current status—the grounds of petitioner's delinquency here. The delinquency regulations are designed to insure that registrants comply with the duties they owe to the Selective Service System and to provide a means of compelling registrants to maintain contact with their local boards.[34] The Selective Service System has a large interest in maintaining contact with petitioner. He is of a draft-eligible age, and his status as a ministerial student could end at any time should he leave school for one reason or another before completing his studies.

In short, it is the position of the Selective Service System that the delinquency regulations constitute the method that has been devised, with the approval of Congress, for enforcing the maintenance of contact between registrants and the System. Both the purpose and the terms of these regulations apply to petitioner. Thus, the System contends that the petitioner's entitlement to a ministerial exemption is conditioned on compliance with his duties as a registrant—duties it is the function of the delinquency regulations to enforce.[35]

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[34] The Selective Service System notes that here the professed purpose of petitioner's actions was to "disassociate [him]self from the [Selective Service] system" (A. 11).

[35] *Pickens* v. *Cox*, 282 F. 2d 784 (C.A. 10), held that the statutory exemption for a sole surviving son may be waived or abandoned by failure to claim it at an appropriate time. Similarly, here, in the System's view, the statutory exemption for ministerial students may be waived or abandoned by the student's failure to comply with his duties as a registrant.

Finally, the System points out, that this Court, in *Eagles* v. *United States ex rel. Samuels,* 329 U.S. 304, and *Eagles* v. *United States ex rel. Horowitz,* 329 U.S. 317, determined that the exemption of a theological student is not absolute, and that he may be removed from such status when other evidence in his file requires such action. It also contends that the procedure it now supports was approved by the Attorney General in his formal statement,[36] made jointly with the Director of Selective Service in December 1967, in which he said:

> It has long been the law that a registrant who violates any duty affecting his own status (for example, giving false information, failing to appear for examination, or failing to have a draft card) may be declared a "deliquent" registrant by his local draft board. Under consistent practice, information received by federal law enforcement officials regarding a registrant's own status is turned over to his local draft board for appropriate action. When a person is declared to be a delinquent registrant by his local board, he may be reclassified and becomes subject to the highest priority for induction if otherwise qualified. If he fails to step forward for induction, he is subject to prosecution by the Department of Justice. This procedure is firmly established, approved by the courts, and has been followed since the en-

[36] The full text of this joint statement is included in Appendix B (*infra*, pp. 79–80).

There is also included in Appendix C (*infra*, pp. 81–82) the relevant proceedings in *National Student Association* v. *Hershey*, Civil Action, 3078–67, D.D.C.

actment of the 1948 Selective Service Act, as well as under earlier Selective Service Acts.

The Attorney General thus made it clear that such violations should be handled administratively by the Selective Service System, rather than by prosecution for the particular offense.

CONCLUSION

For the reasons stated, the judgment below should be reversed and the cause remanded with directions to hold a hearing on the merits of the complaint, including the question of the jurisdictional amount required by 28 U.S.C. 1331, and, if the alleged facts are proved, to enter a decree in favor of petitioner on the basis of his status as a statutorily exempt ministerial student.

Respectfully submitted.

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EDWIN L. WEISL, JR.,
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SEPTEMBER 1968.

APPENDIX A

Pertinent passages from District Judge Dooling's opinion in *United States* v. *Eisdorfer*, No. 67 Cr. 302, decided June 24, 1968 (E.D.N.Y.) relating to the validity of delinquency reclassification (see *supra*, p. 55) read as follows:

> That the validity of the delinquency regulations * * * raise[s] a grave issue is evident. It is not that military service or induction into it can be regarded as punitive. The legally cognizable interest involved is the interest in being inducted only in the statutory circumstances, after a proper review by the local board of any relevant claims to deferment or exemption (all of which exist in the public interest and not primarily as individual privileges), and in the order of induction established by regulations which are lawful under the statute. The delinquency regulations empower the local board to declare a registrant delinquent for failure to perform any duty required of him under the Act (other than reporting for induction or civilian work). * * * The registrant's duties embrace not only the primary ones of registration, submission to specific directions to report (as for examination), and submission to induction, but also secondary duties that in some instances do no more than facilitate administration of the system and in others are more evidently in some form indispensable to effective administration of the law. Some of the duties are expressed in such terms that literal interpretation of them is impossible, and they invite judgmatical approxima-

tions of compliance that could easily be wrong. * * * Although the imposed duties range widely in importance and in the inherent probability that non-compliance will be willful or will be damaging to the just administration of the selective service system, if there is any failure to perform any duty, "the local board may declare [the registrant] to be a delinquent" whether the failure is the result of innocent inadvertence, reasonable misinterpretation, negligence, willful disobedience rooted in principle or malign evasion. * * * There are no degrees of delinquency. No standards prescribe the particular occasions when the power is to be exerted, or what findings of gravity, of willfulness, of penitence, of reparation are relevant to deciding whether or not to declare the registrant delinquent. It does not help that the regulations may not be insupportably vague in describing the duties imposed. The fault is in the absence of any standard or guide to the evalution of the importance of the omitted duty and the guilt-character of the omission to perform it.

If the declaration of delinquency were only a first stage to be followed by an ordered and sortable set of governmental responses, the arbitrariness of the regulations would be relieved; but the regulations contemplate only one kind of delinquency with one consequence for all cases in which the status is acted upon, and there is no alternative except complete remission, again by local board action taken at unbounded discretion. A registrant declared delinquent "may be removed from that status by the local board at any time." * * * No standards for removal from delinquency status are furnished. No right to be removed from the status is granted, no standards of appeal are stated. If the delinquent status is not terminated, then the local board "may" classify the registrant Class 1–A (or 1–A–O) "regardless

of other circumstances" than the delinquency. * * * No standards govern the decision. If the 1–A classification is made, and it may be extended to one who, but for a minor delinquency, would be triply deferrable for family hardship, and occupational reasons, then the "local board shall order [the] delinquent . . . to report for induction in the manner provided in Section 1631.7 * * *."

Nowhere, then, in the delinquency regulations are any standards of application or remission stated. They enunciate no delinquency policy, and invoke no part of the statute that can be argued to enunciate a Congressional policy that the delinquency regulations can be said to implement. The delinquency procedure has no statutory authorization and no Congressional support except what can be spelled out of the 1967 amendment of 50 U.S.C. App. § 456(h)(1), which recognizes the prime classes for call-up as being "delinquents and volunteers." The delinquency regulations, moreover, disregard the structure of the Act; deferments and priorities-of-induction, adopted in the public interest, are treated as if they were forfeitable personal privileges.

It would appear that unless it can be shown that settled administration and published instructions having the effect of rules or regulations have essentially turned the delinquency regulations into standardized compliance-securing procedures that are compatible with the Act and the valid substantive regulations adopted under it, they cannot be regarded as a legally sufficient authorization for reclassification or priority-of-induction that would not otherwise be authorized by the Act and valid substantive regulations adopted under it. *Cf. Panama Refining Co.* v. *Ryan,* 1935, 293 U.S. 388, 428 *et seq.; Zemel* v. *Rusk,* 1965, 381 U.S. 1, 17–18.

APPENDIX B

JOINT STATEMENT OF ATTORNEY GENERAL RAMSEY CLARK AND DIRECTOR OF SELECTIVE SERVICE LEWIS B. HERSHEY

The Department of Justice has established a special unit in the Criminal Division to coordinate prompt prosecution of offenses against the Selective Service laws and related statutes. The responsibilities of this unit include prosecution of violations of provisions of the Selective Service law making it unlawful knowingly to counsel, aid, or abet others to refuse to register or serve, or knowingly to interfere by force or violence or otherwise with the administration of the System. This unit also has responsibility for prosecution of violations of the related statutes outlawing interference with the Armed Forces or obstruction of recruiting and enlistments. The special prosecution unit is under the direction of John Van de Kamp, formerly U.S. Attorney for the Central District of California and now Deputy Director of the Executive Office for U.S. Attorneys.

All U.S. Attorneys have been instructed to speed up investigation and prosecutorial recommendations on these cases. They have also been directed to cooperate with local law enforcement officials and to urge them to vigorously prosecute violations of local laws which may occur in demonstrations against the Selective Service System.

It has long been the law that a registrant who violates any duty affecting his own status (for example,

giving false information, failing to appear for examination, or failing to have a draft card) may be declared a "delinquent" registrant by his local draft board. Under consistent practice, information received by federal law enforcement officials regarding a registrant's own status is turned over to his local draft board for appropriate action. When a person is declared to be a delinquent registrant by his local board, he may be reclassified and become subject to the highest priority for induction if otherwise qualified. If he fails to step forward for induction, he is subject to prosecution by the Department of Justice. This procedure is firmly established, approved by the courts, and has been followed since the enactment of the 1948 Selective Service Act, as well as under earlier Selective Service Acts.

Lawful protest activities, whether directed to the draft or other national issues, do not subject registrants to acceleration or any other special administrative action by the Selective Service System. Activities which violate federal law will be dealt with under the procedures outlined above depending upon the nature of the conduct. The lawful exercise of rights of free expression and peaceful assembly have incurred and will incur no penalty or other adverse action. These rights are guaranteed by the Constitution. They are vital to the preservation of free institutions, which our men in Vietnam are fighting to protect.

No single statement can cover the myriad different factual situations presented by the conduct of individual registrants. In approaching these situations, we will continue to work to preserve the integrity and effective operation of the Selective Service System while fully protecting the constitutional rights of the registrants.

APPENDIX C

United States District Court for the District of Columbia

Civil Action 3078–67

NATIONAL STUDENT ASSOCIATION, ET AL., PLAINTIFF

v.

LEWIS B. HERSHEY, DEFENDANT

(Washington, D.C., Thursday, March 7, 1968)

* * * * *

PROCEEDINGS

The COURT. All right.

There is pending a plaintiff's motion for preliminary injunction which becomes moot by reason of both sides having moved for summary judgment. Therefore, the motion for preliminary injunction will be denied.

It is the opinion of the Court that the letter of General Hershey had no legal effect whatever, and that, therefore, the Court has no jurisdiction to enjoin or otherwise affect his issuance of this letter which, as far as the Court can see, merely expressed his personal opinion.

Further, were it otherwise, the Act of Congress in the recent amendment in 1967, I believe, would de-

prive this Court of jurisdiction to consider the matter.

And further, there is an adequate remedy for anyone whose rights are abused in the event they are reclassified by exercising a constitutional right administratively and through the Federal Courts to protect that interest.

The Court will, therefore, deny the plaintiff's motion for summary judgment, and will grant the Government's motion for summary judgment, and will grant the Government's motion to dismiss.

U.S. GOVERNMENT PRINTING OFFICE: 1968

SUPREME COURT OF THE UNITED STATES

No. 46.—October Term, 1968.

James J. Oestereich, Petitioner,
v.
Selective Service System Local Board No. 11, Cheyenne, Wyoming, et al.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[December 16, 1968.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner is enrolled as a student at a theological school preparing for the ministry and was accordingly classified as IV–D by the Selective Service Board. Section 6 (g) of the Selective Service Act, 50 U. S. C. App. § 456 (g), gives such students exemption from training and service under the Act.[1] He returned his registration certificate to the Government, according to the complaint in the present action, "for the sole purpose of expressing dissent from the participation by the United States in the war in Vietnam." Shortly thereafter his Board declared him delinquent (1) for failure to have the

[1] Section 6 (g) reads as follows:

"Regular or duly ordained ministers of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been preenrolled shall be exempt from training and service (but not from registration) under this title."

registration certificate in his possession,[2] and (2) for failure to provide the Board with notice of his local status. The Board thereupon changed his IV–D classification to I–A. He took an administrative appeal and lost and was ordered to report for induction.

At that point he brought suit to restrain his induction. The District Court dismissed the complaint, 280 F. Supp. 78, and the Court of Appeals affirmed. 390 F. 2d 100. The case is here on a petition for a writ of certiorari which we granted. 391 U. S. 912.

As noted, § 6 (g) of the Act states that "students preparing for the ministry" in qualified schools "shall be exempt from training and service" under the Act.[3] Equally unambiguous is § 10 (b)(3) of the Military Selective Service Act of 1967, 81 Stat. 100, which provides that there shall be no preinduction judicial review "of the classification or processing of any registrant" [4] judicial review being limited to a defense in a criminal

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[2] Section 1617.1 of the Selective Service System Regulations requires a registrant to have the certificate in his personal possession at all times (32 CFR § 1617.1) and § 1642.4, 32 CFR § 1642.4 (a) provides that whenever a registrant fails to perform "any duty" required of him (apart from the duty to obey an order to report for induction), the Board may declare him to be "a delinquent."

[3] The United States admits for purposes of the present proceeding by its motion to dismiss that petitioner satisfies the requirements of the exemption provided by § 6 (g).

[4] Section 10 (b)(3) reads as follows:

"No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That each such review shall go to the question of the jurisdiction herein reserved to local boards, appeals boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

prosecution or, as the Government concedes, to habeas corpus after induction.[5] See *Estep* v. *United States*, 327 U. S. 114, 123–125; *Eagles* v. *Samuels*, 329 U. S. 304; *Witmer* v. *United States*, 348 U. S. 375, 377. If we assume, as we must for present purposes, that petitioner is entitled to a statutory exemption as a divinity student, by what authority can the Board withhold it or withdraw it and make him a delinquent?

In 1967 Congress added a provision concerning the immediate service of a "prime age group" after expiration of their deferment, stating that they were the first to be in-

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[5] S. Rep. No. 209, 90th Cong., 1st Sess., p. 10.

"A registrant who presents himself for induction may challenge his classification by seeking a writ of habeas corpus after his induction. If the registrant does not submit to induction, he may raise as a defense to a criminal prosecution the issue of the legality of the classification."

In *Falbo* v. *United States*, 320 U. S. 549, a Jehovah's Witness had been given conscientious objector status and ordered to report to a domestic camp for civilian work in lieu of military service. In defense to a criminal prosecution for disobeying that order, he argued that his local board had wrongly classified him by denying him an exemption as a minister. Without deciding whether Congress envisaged judicial review of such classifications, we held that a registrant could not challenge his classification without first exhausting his administrative remedies by reporting, and being accepted, for induction. Because he might still have been rejected at the civilian camp for mental or physical disabilities, Falbo had omitted a "necessary intermediate step in a united and continuous process designed to raise an army speedily and efficiently." In *Estep* v. *United States*, 327 U. S. 114, petitioners were Jehovah's Witnesses like Falbo who had been denied ministerial exemptions and who challenged that classification in defense to a criminal prosecution for refusing induction. In their case, however, they had exhausted their administrative remedies by reporting, and being accepted, for service, before then refusing to submit to induction. We found nothing in the 1940 Act to preclude judicial review of selective service classifications in defense to a criminal prosecution for refusing induction.

ducted "after delinquents and volunteers." 50 U. S. C. App. § 456 (h)(1). Congress has also made criminal the knowing failure or neglect to perform any duty prescribed by the rules or regulations of the Selective Service System. 50 U. S. C. App. § 462 (a). But Congress did not define delinquency; nor did it provide any standards for its definition by the Selective Service System. Yet Selective Service, as we have noted,[6] has promulgated regulations governing delinquency and uses them to deprive registrants of their statutory exemption, because of various activities and conduct and without any regard to the exemptions provided by law.

We can find no authorization for that use of delinquency. Even if Congress had authorized the Boards to revoke statutory exemptions by means of delinquency classifications, serious questions would arise if Congress were silent and did not prescribe standards to govern the Boards' actions. There is no suggestion in the legislative history that, when Congress has granted an exemption and a registrant meets its terms and conditions, a Board can nonetheless withhold it from him for activities or conduct not material to the grant or withdrawal of the exemption. So to hold would make the Boards free-wheeling agencies meting out their brand of justice in a vindictive manner.

Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption. The Solicitor General confesses error on the use by Selective Service of delinquency proceedings for that purpose.

We deal with conduct of a local Board that is basically lawless. It is no different in constitutional implications from a case where induction of an ordained minister or

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[6] N. 2, *supra*.

other clearly exempt person is ordered (a) to retaliate against the person because of his political views or (b) to bear down on him for his religious views or his racial attitudes or (c) to get him out of town so that the amorous interests of a Board member might be better served. See *Townsend* v. *Zimmerman*, 237 F. 2d 376. In such instances, as in the present one, there is no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved. The case we decide today involves a clear departure by the Board from its statutory mandate. To hold that a person deprived of his statutory exemption in such a blatantly lawless manner must either be inducted and raise his protest through habeas corpus or defy induction and defend his refusal in a criminal prosecution is to construe the Act with unnecessary harshness. As the Solicitor General suggests, such literalness does violence to the clear mandate of § 6 (g) governing the exemption. Our construction leaves § 10 (b) (3) unimpaired in the normal operations of the Act.

No one, we believe, suggests that § 10 (b) (3) can sustain a literal reading. For while it purports on its face to suspend the writ of habeas corpus as a vehicle for reviewing a criminal conviction under the Act, everyone agrees that such was not its intent. Examples are legion where literalness in statutory language is out of harmony either with constitutional requirements, *United States* v. *Rumely*, 345 U. S. 41, or with an Act taken as an organic whole. *Clark* v. *Uebersee Finanz-Korp*, 332 U. S. 480, 488–489. We think § 10 (b) (3) and § 6 (g) are another illustration; and the Solicitor General agrees. Since the exemption granted divinity students is plain and unequivocal and in no way contested here,[7] and since the

[7] We would have a somewhat different problem were the contest over, say, the quantum of evidence necessary to sustain a Board's classification. Then we would not be able to say that it was plain

scope of the statutory delinquency concept is not broad enough to sustain a revocation of what Congress has granted as a statutory right, or sufficiently buttressed by legislative standards, we conclude that pre-induction judicial review is not precluded in cases of this type.

We accordingly reverse the judgment and remand the case to the District Court where petitioner must have the opportunity to prove the facts alleged and also to demonstrate that he meets the jurisdictional requirements of 28 U. S. C. § 1331.

Reversed.

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on the record and on the face of the Act that an exemption had been granted and there would therefore be no clash between § 10 (b) (3) and another explicit provision of the Act.

SUPREME COURT OF THE UNITED STATES

No. 46.—October Term, 1968.

James J. Oestereich, Petitioner, *v.* Selective Service System Local Board No. 11, Cheyenne, Wyoming, et al.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[December 16, 1968.]

Mr. Justice Harlan, concurring in the result.

I concur in the holding that pre-induction review is available in this case, but I reach this conclusion by means of a somewhat different analysis from that contained in the opinion of my Brother Douglas.

At the outset, I think it is important to state what this case does and does not involve. Petitioner does not contend that the Selective Service System has improperly resolved factual questions, or wrongfully exercised its discretion, or even that it has acted "without any basis in fact," as that phrase is commonly used in this area of law. See *Estep* v. *United States*, 327 U. S. 114, 122–123 (1946); *ante*, at 6, n. 7. He asserts, rather, that the procedure pursuant to which he was reclassified and ordered to report for induction—a procedure plainly mandated by the System's self-promulgated published regulations, 32 CFR, part 1642—is unlawful. Specifically, he asserts that the delinquency reclassification scheme is not authorized by any statute, that it is inconsistent with his statutory exemption as a ministerial student, 50 U. S. C. App. § 456 (g), and that, whether or not approved by Congress, the regulations are facially unconstitutional.[1]

[1] Petitioner makes several other arguments which I do not find necessary to discuss.

The pivotal language of § 10 (b)(3), for present purposes, is the statute's proscription of pre-induction judicial review "of the classification or processing of any registrant . . . ." I take the phrase "classification or processing" to encompass the numerous discretionary, factual, and mixed law-fact determinations which a Selective Service board must make prior to issuing an order to report for induction. I do not understand that phrase to prohibit review of a claim, such as that made here by petitioner, that the very statutes or regulations which the board administers are facially invalid.

"Classification is the key to selection," 32 CFR § 1622.1 (b), and among a local board's most important functions is "to decide, subject to appeal, the class in which each registrant shall be placed." 32 CFR § 1622.1 (c). Classification is a highly individualized process, in which a board must consider all pertinent information presented to it. *Ibid.* Thus, a board may be required to determine, on a conflicting record, whether a registrant is conscientiously opposed to participation in war in any form, 32 CFR § 1622.14, or whether the registrant's deferment "is in the national interest and of paramount importance to our national security . . . ." 32 CFR § 1622.20. A board also exercises considerable discretion in the processing of registrants—for example, in securing information relevant to classification, 32 CFR §§ 1621.9–1621.15, scheduling of physical examinations, 32 CFR, part 1628, and scheduling and postponement of induction itself, 32 CFR, part 1632.

Congress' decision to defer judicial review of such decisions by the Selective Service boards until after induction was, I believe, responsive to two major considerations. *First,* because these determinations are of an individualized and discretionary nature, a reviewing court must often examine board records and other docu-

mentary evidence, hear testimony, and resolve controversies on a sizeable record. Even though the scope of judicial review is narrow, see *Estep* v. *United States*, *supra*, at 122–123, this cannot be done quickly. To stay induction pending such review would work havoc with the orderly processing of registrants into the Nation's armed forces. See 113 Cong. Rec. 8052 (June 12, 1967) (Senator Russell); cf. *Estep* v. *United States*, *supra*, at 137 (concurring opinion of Mr. Justice Frankfurter).

Second, the registrant has been afforded, prior to his induction, the opportunity for a hearing and administrative appeals within the Selective Service System. 32 CFR, parts 1624–1627. It is properly presumed that a registrant's board has fully considered all relevant information presented to it, and that it has classified and processed him regularly, and in accordance with the applicable statutes and regulations. *Greer* v. *United States*, 378 F. 2d 931 (1967); *Storey* v. *United States*, 370 F. 2d 255 (1966); cf. *United States* v. *Chemical Foundation*, 272 U. S. 1, 14–15 (1926); *Chin Yow* v. *United States*, 208 U. S. 8, 12 (1908); *Martin* v. *Mott*, 12 Wheat. 19 (1827).

These factors are significantly altered where the registrant contends that the procedure employed by the board is invalid on its face.

First, such a claim does not invite the court to review the factual and discretionary decisions inherent in the "classification or processing" of registrants, and does not, therefore, present opportunity for protracted delay. To be sure, collateral factual determinations—for example, whether the registrant was subjected to the statute or regulation drawn in question (in this case, the delinquency reclassification procedure)—may sometimes be necessary. But in general, a court may dispose of a

challenge to the validity of the procedure on the pleadings. Insubstantial claims can usually be weeded out with dispatch.[2]

Second, a challenge to the validity of the administrative procedure itself not only renders irrelevant the presumption of regularity,[3] but presents an issue beyond the competence of the Selective Service boards to hear and determine. Adjudication of the constitutionality of congressional enactments[4] has generally been thought beyond the jurisdiction of administrative agencies. See *Public Utilities Commission* v. *United States*, 355 U. S. 534, 539 (1958); *Engineers Public Service Co.* v. *SEC*, 138 F. 2d 936, 952–953 (1943), dismissed as moot, 332 U. S. 788. The boards have no power to promulgate regulations, and are not expressly delegated any authority to pass on the validity of regulations or statutes. Such authority cannot readily be inferred, for the composition of the boards, and their administrative procedures, render them wholly unsuitable forums for the adjudication of these matters: local and appeal boards consist

[2] Moreover, a court should be hesitant to grant a preliminary injunction staying induction except upon a strong showing that the registrant is likely to succeed on the merits.

[3] A suggestive analogy may be found in the Court's construction of the civil rights removal statute, 28 U. S. C. § 1443. Where state statutory procedure is valid on its face, it is presumed that the state courts will treat a defendant fairly, and removal is not permitted. *Georgia* v. *Rachel*, 384 U. S. 780, 803–804 (1966); *Virginia* v. *Rives*, 100 U. S. 313, 321–323 (1879). But, subject to qualifications not here pertinent, a defendant may remove the cause when the state statutory procedure is facially invalid: "When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions . . . ." *Id.*, at 321. See also *Greenwood* v. *Peacock*, 384 U. S. 808 (1966).

[4] It may be noted that the Selective Service System urges that the delinquency reclassification provisions have been approved by Congress. Brief for the Respondents, p. 71.

of part-time, uncompensated members, chosen ideally to be representative of the registrants' communities;[5] the fact that a registrant may not be represented by counsel in Selective Service proceedings, 32 CFR § 1624.1 (b), seems incompatible with the boards' serious consideration of such purely legal claims. Indeed, the denial of counsel has been justified on the ground that the proceedings are nonjudicial. *United States* v. *Sturgis*, 342 F. 2d 328, 332 (1965), cert. denied, 382 U. S. 879; cf. *United States* v. *Capehart*, 141 F. Supp. 708, 719 (1956); affirmed, 237 F. 2d 388 (1957), cert. denied, 352 U. S. 971.

To withhold pre-induction review in this case would, thus, deprive petitioner of his liberty without the prior opportunity to present to *any* competent forum—agency or court—his substantial claim that he was ordered inducted pursuant to an unlawful procedure. Such an interpretation of § 10 (b)(3) would raise serious constitutional problems,[6] and is not indicated by the stat-

[5] See 32 CFR §§ 1603.3, 1604.22; Memorandum from General Hershey, S. Doc. No. 82, 98th Cong., 2d Sess., p. 4; Weekly Compilation of Presidential Documents, March 13, 1967, p. 395; Report of the National Advisory Commission on Selective Service, pp. 74–79 (1967).

Although each local board has assigned to it a part-time, uncompensated appeal agent—"whenever possible, a person with legal training and experience," 32 CFR § 1604.71 (c)—his pertinent responsibilities to the board are limited to assisting its members by "interpreting for them laws, regulations, and other directives," 32 CFR § 1604.71 (d)(4), and he must be "equally diligent in protecting the interests of the Government and the registrant in all matters." 32 CFR § 1604.71 (d)(4).

[6] It is doubtful whether a person may be deprived of his personal liberty without the prior opportunity to be heard by some tribunal competent fully to adjudicate his claims. Cf. *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 596–598 (1953); *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126, 152–153 (1941); *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 463 (1934); *Londoner* v. *City*

ute's history,[7] language, or purpose. On the foregoing basis I agree that § 10 (b)(3) does not forbid pre-induction review in this instance.

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and County of Denver, 210 U. S. 373, 385 (1908); *Dixon* v. *Alabama State Board of Education*, 294 F. 2d 150 (1961). But cf. *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950); *Bowles* v. *Willingham*, 321 U. S. 503, 520 (1944); *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306 (1908). The validity of summary administrative deprivation of liberty without a full hearing may turn on the availability of a prompt subsequent hearing, cf. U. S. Const., Amendment VI; *United States* v. *Ewell*, 383 U. S. 116, 120 (1966); *Freedman* v. *Maryland*, 380 U. S. 51 (1965)—something not made meaningfully available to petitioner here, either by the option of defending a criminal prosecution for refusing to report for induction, see *Ex parte Young*, 209 U. S. 123 (1908); *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (1920); cf. *Reisman* v. *Caplin*, 375 U. S. 440 (1964), or by filing a petition for a writ of habeas corpus after induction. See *ante*, 5; *Estep* v. *United States*, *supra*, at 129–130 (concurring opinion of Mr. Justice Murphy).

The problem is exacerbated by petitioner's nonfrivolous argument that induction pursuant to the delinquency reclassification procedure constitutes "punishment" for violation of collateral regulations, without jury trial, right to counsel, and other constitutional requisites. See *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 168–169 (1963) It is not necessary to decide this issue. If petitioner's claim is valid, however, then postponement of a hearing until after induction is tantamount to permitting the imposition of summary punishment, followed by loss of liberty, without possibility of bail, until such time as the petitioner is able to secure his release by a writ of habeas corpus. This would, at very least, cut against the grain of much that is fundamental to our constitutional tradition. Cf. Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts, 66 Harv. L. Rev. 1362, 1380–1383 (1953).

[7] The salient parts of the statute's sparse legislative history are set out in my Brother STEWART's dissenting opinion, *post*, 3. Both the House and Senate committees were "disturbed by the apparent inclination of some courts to review the classification action of local or appeal boards before the registrant had exhausted his administrative remedies." H. R. Rep. No. 267, 90th Cong., 1st Sess., 30 (1967); S. Rep. No. 209, 90th Cong., 1st Sess., 10 (1967). As I have discussed in the preceding text, the boards can provide

Because both the District Court and the Court of Appeals passed on the merits of petitioner's challenge to the delinquency reclassification regulations, this issue is ripe for our consideration. Whatever validity the procedure may have under other circumstances, I agree that the delinquency reclassification of petitioner for failure to possess his registration certificate is inconsistent with petitioner's conceded statutory exemption as a student of the ministry.

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no remedy for a registrant's claim that the regulations or statutes are themselves invalid. (This is not to say that a registrant making such a claim may come into court before he has exhausted his administrative appeals, for the System may decide in his favor on other grounds, obviating the need for further review. Cf. my dissent in *Public Utilities Commission v. United States, supra,* at 549–550; *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752, 772 (1947). Petitioner here has exhausted available remedies. Appendix, p. 4.)

Section 10 (b)(3) was likely precipitated by the Second Circuit's well-publicized decision in *Wolff* v. *Selective Service Local Board No. 16,* 372 F. 2d 817 (1967). See dissenting opinion of MR. JUSTICE STEWART, *post,* 2; Brief for Respondent, pp. 19, n. 4, 69, n. 32. *Wolff,* as well as the other "recent cases" to which the committee reports probably referred, and this Court's decisions construing the antecedent to § 10 (b)(3), all involved claims that the Selective Service boards had maladministered or misapplied the applicable statutes or regulations, and not challenges to the validity of the laws themselves. *Wolff* v. *Selective Service Local Board No. 16, supra* (loss of deferment for participating in demonstration); *Townsend* v. *Zimmerman,* 237 F. 2d 376 (1956) (failure to follow proper appeal procedure); *Schwartz* v. *Strauss,* 206 F. 2d 767 (1953) (concurring opinion) (misclassification); *Ex parte Fabiani,* 105 F. Supp. 139 (1952) (refusal to recognize foreign medical school for deferment); *Tomlinson* v. *Hershey,* 95 F. Supp. 73 (1949) (refusal to hear request for deferment); *Estep* v. *United States, supra* (entitlement to ministerial exemption); *Falbo* v. *United States,* 321 U. S. 542 (1944) (entitlement to conscientious objector status).

SUPREME COURT OF THE UNITED STATES

No. 46.—October Term, 1968.

James J. Oestereich, Petitioner,
v.
Selective Service System Local Board No. 11, Cheyenne, Wyoming, et al.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[December 16, 1968.]

Mr. Justice Stewart, with whom Mr. Justice Brennan and Mr. Justice White join, dissenting.

It is clear that in enacting § 10 (b) (3) of the Military Selective Service Act of 1967,[1] Congress intended to specify the exclusive methods by which the determinations of selective service boards may be judicially reviewed. Since under the terms of that provision the present suit is plainly premature, I would affirm the judgment of the Court of Appeals.

Section 10 (b) (3) provides in pertinent part as follows:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction . . . ."

It is unquestioned that the overriding purpose of this provision was "to prevent litigious interruptions of procedures to provide necessary military manpower."[2] To

[1] 50 App. U. S. C. § 460 (b) (3) (Supp. III, 1968). The Act amends and supersedes the Universal Military Training and Service Act.

[2] 113 Cong. Rec. 8052 (1967) (Senator Russell).

be sure, the provision is somewhat inartistically drawn, but its background and legislative history clearly resolve whatever difficulties might otherwise be presented by the imprecision of the draftsman's language.

In interpreting the less explicit terms of predecessor statutes,[3] this Court had established the general rule that draft classifications could not be judicially reviewed prior to the time a registrant was to be inducted. Review was held to be proper only when challenges to such determinations were raised either (1) in defense to a criminal prosecution following a refusal to be inducted, or (2) in habeas corpus proceedings initiated after induction. See *Witmer* v. *United States*, 348 U. S. 375, 377; *Estep* v. *United States*, 327 U. S. 114; *Billings* v. *Truesdell*, 321 U. S. 542; *Falbo* v. *United States*, 320 U. S. 549.

Occasionally, however, other federal courts had allowed exceptions to this rule.[4] Section 10 (b)(3) was proposed and enacted shortly after the Court of Appeals for the Second Circuit had, in the well publicized case of *Wolff* v. *Local Bd. No. 16*, 372 F. 2d 817, permitted just such an exception.[5] In adopting the section Congress specifically disapproved those decisions that had deviated from the rule against pre-induction review, and made explicit its absolute commitment against premature judicial interference with the orderly processing of regis-

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[3] See § 10 (a)(2) of the Selective Training and Service Act of 1940, 54 Stat. 893:

"[D]ecisions of . . . local boards shall be final except where an [administrative] appeal is authorized . . . ."

See also *Estep* v. *United States*, 327 U. S. 114, 119, 123–125.

[4] See *Townsend* v. *Zimmerman*, 237 F. 2d 376; *Schwartz* v. *Strauss*, 206 F. 2d 767 (concurring opinion); *Ex parte Fabiani*, 105 F. Supp. 139; *Tomlinson* v. *Hershey*, 95 F. Supp. 72.

[5] In *Wolff* the court allowed pre-induction review of the reclassification of two students who had demonstrated against the hostilities in Viet Nam.

trants. The Senate Armed Services Committee put the matter this way:

> "Until recently, there was no problem in the observance of the finality provision. In several recent cases, however, district courts have been brought into selective service processing prematurely. The committee attaches much importance to the finality provisions and reemphasizes the original intent that judicial review of classifications should not occur until after the registrant's administrative remedies have been exhausted and the registrant presents himself for induction." [6]

A similar statement of intent was included in the report of the House Armed Services Committee:

> "The committee was disturbed by the apparent inclination of some courts to review the classification action of local or appeal boards before the registrant had exhausted his administrative remedies. Existing law quite clearly precludes such a judicial review until after the registrant has been ordered to report for induction and has responded either affirmatively or negatively to such an order. In view of this inclination of the courts to prematurely inquire into the classification action of local boards, the committee has rewritten this provision of the law so as to more clearly enunciate this principle. The committee was prompted to take this action since continued disregard of this principle of the law by various courts could seriously affect the administration of the Selective Service System." [7]

Although the language of § 10 (b)(3) contains no explicit reference to habeas corpus as a remedy for in-

[6] S. Rep. No. 209, 90th Cong., 1st Sess., 10 (1967).

[7] H. R. Rep. No. 267, 90th Cong., 1st Sess., 30–31 (1967).

ductees seeking to challenge their classifications, that remedy was plainly recognized and approved by Congress. The section provides for review "after the registrant has responded *either affirmatively or negatively* to an order to report for induction . . . ." (Emphasis added.) The remedy for one who responds affirmatively cannot, of course, be by way of "defense to a criminal prosecution" for refusing to be inducted; the only remedy in such a case is habeas corpus, and the Senate Committee Report made quite clear Congress' understanding in this regard:

> "A registrant who presents himself for induction may challenge his classification by seeking a writ of habeas corpus after his induction. If the registrant does not submit to induction, he may raise as a defense to a criminal prosecution the issue of the legality of the classification."[8]

Thus there can be no doubt that § 10 (b)(3) was designed to permit judicial review of draft classifications only in connection with criminal prosecutions or habeas corpus proceedings. Today, however, the Court holds that § 10 (b)(3) does not mean what it says in a case like this, where it is "plain on the record and on the face of the Act that an exemption ha[s] been granted."[9] In such a case, it is said, there is a "clash" between the exemption and the provisions of § 10 (b)(3). With all respect, I am simply unable to perceive any "clash" whatsoever. Exemptions from service are substantive, while § 10 (b)(3) is purely procedural, specifying *when* substantive rights may be asserted. How the Court can conclude that the provisions of § 10 (b)(3) somehow do

[8] S. Rep. No. 209, *supra*, at 10.

[9] The Court seems to limit its holding to statutory "exemptions"; yet "deferments" may just as "plainly" preclude a registrant's induction. See, *e. g.*, 50 App. U. S. C. § 456 (h)(1) (Supp. III, 1968); 32 CFR § 1622.25 (1968) (full-time college students).

"violence to" the divinity student exemption is a mystery to me.[10]

The only other reason the Court offers for its casual disregard of § 10 (b)(3) is the suggestion that obedience

[10] A different ground for permitting review in the present case is set out in the concurring opinion of my Brother HARLAN. His opinion is founded on the proposition that constitutional problems would be presented by a system that "deprive[d] petitioner of his liberty without the prior opportunity to present to *any* competent forum—agency or court—his substantial claim that he was ordered inducted pursuant to an unlawful procedure." MR. JUSTICE HARLAN seeks to avoid such difficulties by viewing § 10 (b)(3) as intended to prohibit not all delays in the processing of registrants, but merely those protracted delays that result from judicial consideration of factual claims.

As the absence of any exception in its terms indicates, however, § 10 (b)(3) plainly was intended to prevent any interruption whatever of the orderly processing of registrants. There is not a glimmer of evidence in the section's legislative history that Congress intended to prevent some sorts of delay but not others. Moreover, it is difficult to reconcile the distinction MR. JUSTICE HARLAN seeks to draw—between claims "that the procedure employed by the board is invalid on its face" and challenges to a board's factual determinations—with his recognition that the enactment of § 10 (b)(3) was in substantial part a congressional reaction to the Second Circuit's decision in *Wolff* v. *Local Bd. No. 16*, 372 F. 2d 817. *Wolff* involved no factual dispute whatsoever; rather, that decision held that, on the basis of admitted facts, the "delinquency" reclassification of the registrants there involved had been entirely unauthorized under both the statute and the applicable regulations.

Nor can I view the constitutional theory suggested by my Brother HARLAN as presenting a justifiable ground for decision. It is noteworthy, first of all, that no such theory has ever been advanced by the petitioner. Furthermore, persons arrested for criminal offenses are routinely deprived of their liberty—to a greater extent than are military inductees—without any prior opportunity for the adjudication of legal or constitutional claims, and often without any hope of securing release on bail. Preliminary hearings before magistrates by and large determine only the existence of a prima facie case for the prosecution, and do not begin to reach defenses that

to the statute would lead to "unnecessary harshness." But if the statute is constitutional, we have no power to disregard it simply because we think it is harsh. That is a judgment for Congress, not for us. And the Court does not question the law's constitutionality.[11] To the contrary, the constitutionality of § 10 (b)(3) is upheld this very day in *Clark* v. *Gabriel*, — U. S. —, in reaffirmation of several previous decisions in which this Court has enunciated and applied the rule against pre-induction review of selective service determinations.[12]

The Court states that its "construction leaves § 10 (b)(3) unimpaired in the normal operations of the Act."

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might be raised, whether factual, legal, or constitutional. Nor does § 10 (b)(3) necessarily compel deprivation of liberty. A registrant in the petitioner's position is free to refuse induction, keeping open the option of raising his claims should a criminal prosecution be brought against him. And it is entirely possible, of course—and more than likely in the petitioner's case—that no such prosecution will ever be instituted.

[11] The petitioner suggests that where the action of a draft board is challenged as a violation of freedom of speech, the postponement of judicial review until after the scheduled time of induction might have a "chilling effect" upon First Amendment activity. But petitioner's complaint presents no bona fide First Amendment issue. His alleged return of his registration certificate to the Government would not be protected expression. *United States* v. *O'Brien*, 391 U. S. 367.

[12] In *Falbo* v. *United States*, 320 U. S. 549, 550, for instance, a registrant who had not reported for induction sought review of his classification, claiming—as the petitioner claims here— that he was entitled to a statutory exemption from all forms of national service . . . . ." In refusing to permit judicial review, the Court, through MR. JUSTICE BLACK, stated:

"Even if there were, as the petitioner argues, a constitutional requirement that judicial review must be available to test the validity of the decision of the local board, it is certain that Congress was not required to provide for judicial intervention before final acceptance of an individual for national service." *Id.*, at 554.

See also *Witmer* v. *United States*, 348 U. S. 375, 377; *Estep* v. *United States*, 327 U. S. 114; *Billings* v. *Truesdell*, 321 U. S. 542,

The implication seems to be that the present case is somehow exceptional. But the Court has carved out an "exception" to § 10 (b)(3) in exactly the kind of case where, in terms of the interests at stake, an exception seems least justified. The registrant with a clear statutory exemption is precisely the one least jeopardized by the procedural limitations of § 10 (b)(3). For, as the Government has acknowledged, "the Department of Justice would not prosecute [such a registrant] if he refused to be inducted, and would promptly confess error if he submits to induction and brings a habeas corpus action." [13]

It is upon those registrants, rather, whose rights are *not* so clear that the burden of § 10 (b)(3) most harshly falls. For it is they who must choose whether to run the serious risk of a criminal prosecution or submit to induction with the uncertain hope of prevailing in a habeas corpus proceeding. Yet the Court has made plain today in *Clark* v. *Gabriel, supra,* that a registrant whose exemption from service is not clear will under § 10 (b)(3) be put to just such a fateful choice. In light of *Gabriel,* the allowance of pre-induction review in the present case thus stands as all the more irrational and unjustified.

I respectfully dissent.

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[13] Brief for Respondent, at 70, n. 33.